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# FEDERAL TRADE COMMISSION DECISIONS

## FINDINGS, OPINIONS AND ORDERS
## JULY 1, 1997 TO DECEMBER 31, 1997

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PUBLISHED BY THE COMMISSION

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## VOLUME 124

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## MEMBERS OF THE FEDERAL TRADE COMMISSION

### DURING THE PERIOD JULY 1, 1997 TO DECEMBER 31, 1997

ROBERT PITOFSKY, *Chairman*
Took oath of office April 12, 1995.

MARY L. AZCUENAGA, *Commissioner*
Took oath of office November 27, 1984.

JANET D. STEIGER, *Commissioner*[*]
Took oath of office August 11, 1989.

SHEILA F. ANTHONY, *Commissioner*
Took oath of office September 30, 1997.

ROSCOE B. STAREK, III, *Commissioner*[**]
Took oath of office November 19, 1990.

MOZELLE W. THOMPSON, *Commissioner*
Took oath of office December 17, 1997.

CHRISTINE A. VARNEY, *Commissioner*[***]
Took oath of office October 14, 1994.

ORSON SWINDLE, *Commissioner*
Took oath of office December 18, 1997.

DONALD S. CLARK, *Secretary*
Appointed August 28, 1988.

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* Resigned, effective September 28, 1997.

** Resigned, effective December 18, 1997.

*** Resigned, effective August 5, 1997.

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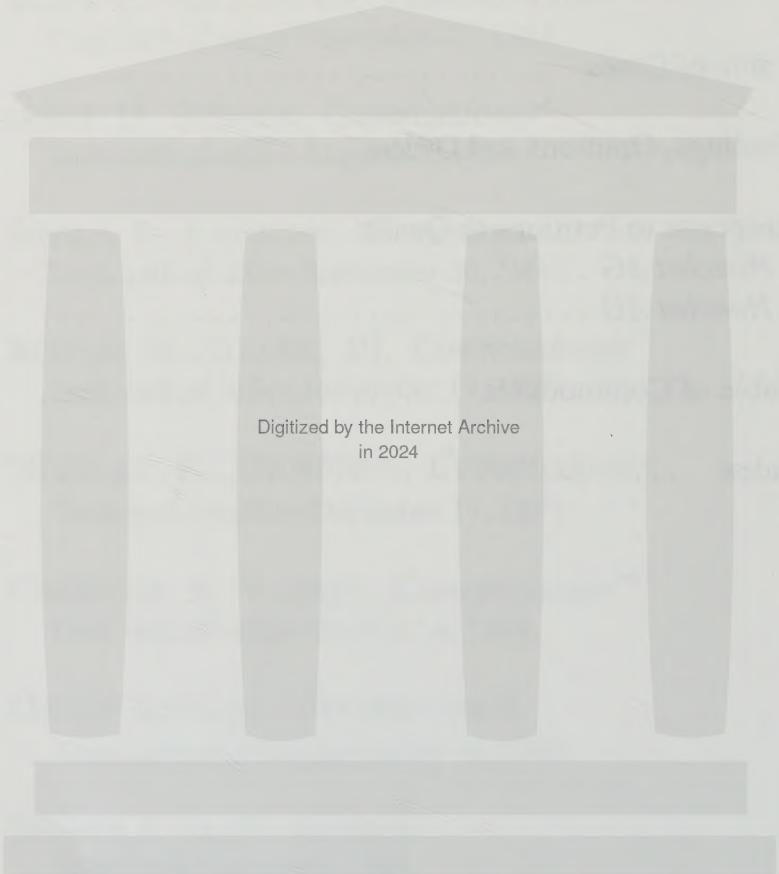

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Findings, Opinions, and Orders

IN THE MATTER OF

# NUTRITION 21, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3758. Complaint, July 11, 1997--Decision, July 11, 1997*

This consent order prohibits, among other things, the two California-based companies and their officer from making unsubstantiated advertising claims for their weight loss and health care products containing chromium picolinate and requires competent and reliable scientific evidence to substantiate any representation concerning the benefits, performance, efficacy or safety of any food, dietary supplement or drug they advertise or sell. The consent order also prohibits misrepresentations of the results of any study, test or research. In addition, the consent order requires the company to send its customers a notice of the Commission's allegations and a request to stop using sales materials that make the challenged claims.

## *Appearances*

For the Commission: *Beth Grossman, Loren G. Thompson* and *C. Lee Peeler.*

For the respondents: *Stephen McNamara, Hymans, Phelps & McNamara,* Washington, D.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Nutrition 21, a limited partnership; Selene Systems, Inc., a corporation and general partner of Nutrition 21; and Herbert H. Boynton, individually and as President of Selene Systems, Inc., a corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Nutrition 21 is a California limited partnership with its principal office or place of business at 1010 Turquoise St., Suite 335, San Diego, CA.

2. Respondent Selene Systems, Inc. is a California corporation and a general partner of Nutrition 21. Its principal office or place of business is the same as that of Nutrition 21.

3. Respondent Herbert H. Boynton is President of Selene Systems, Inc., a corporation. Individually or in concert with others, he formulates, directs, and controls the acts and practices of Nutrition 21 and Selene Systems, Inc., including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Nutrition 21.

4. Respondents have manufactured, advertised, offered for sale, sold, and distributed Chromium Picolinate for use in dietary supplements. Chromium Picolinate is a product subject to the provisions of Sections 12 and 15 of the Federal Trade Commission Act. The United States Department of Agriculture holds the patent on Chromium Picolinate, and Nutrition 21 holds the exclusive license to manufacture and sell Chromium Picolinate.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

6. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Chromium Picolinate, including but not necessarily limited to the attached Exhibits A-G. These advertisements and promotional materials contain the following statements:

A. Lose the Fat but Keep the Muscle . . .

Chromium Picolinate

At last there is a safe nutritional supplement that helps you lose unwanted fat more easily and quickly, while retaining vital muscle tissue. Now you can have a trimmer, firmer, leaner body.

LOSE THE FAT BUT KEEP THE MUSCLE

Most dieters who achieve significant weight loss lose far too much lean body mass (muscle and organ tissue). . . . Even worse, this lessened lean body mass lowers your metabolic rate, making it that much harder to keep the fat off permanently -- the yo-yo syndrome!

There is now excellent scientific evidence that Chromium Picolinate can accelerate fat loss while helping to preserve or even increase muscle.

CONVINCING NEW EVIDENCE

Overweight adults were recruited by a prominent San Antonio weight loss clinic to participate in a weight loss study. About half of the volunteers received supplemental Chromium Picolinate (200 or 400 micrograms chromium daily), while the others received placebos. Neither the participants nor the doctors evaluating them knew who was getting the chromium (a "double- blind" study). The volunteers were not placed on any specific diet or exercise regimen, although most of them were motivated to lose weight. After only 60 days, these were the impressive results:

The changes in the placebo group were negligible. But the Chromium Picolinate group, on average, lost over 4 pounds of fat while gaining nearly a pound and a half of lean muscle for a Net Physique Enhancement of 5.6 pounds.

****

Another double blind-study was conducted in young off- season football players participating in a six-week weight-training program. The results were much the same: more muscle, less fat with Chromium Picolinate. Chromium Picolinate more than doubled the net benefits of exercise alone.

****

LEANER AND FIRMER

Because many people gain muscle with Chromium Picolinate, their weight loss in pounds doesn't accurately reflect the benefits of chromium. Most users report that event [sic] a modest weight loss as shown on the bathroom scale is accompanied by lost inches and smaller clothing sizes. They look and are leaner and firmer. Chromium Picolinate promotes fat loss, while enhancing the muscle that assures a trim athletic physique.

HOW DOES CHROMIUM PICOLINATE WORK?

**Controls Hunger** Many people report that Chromium Picolinate helps to control appetite, especially sugar cravings. It is believed that chromium sensitizes the "glucostat" in the brain that monitors blood sugar availability and "tells" you when you're hungry or not hungry.

**"Spares" Protein** . . . By "sensitizing" muscle to insulin, Chromium Picolinate helps to preserve muscle in dieters so that they "burn" more fat and less muscle. Preservation of lean body mass has an important long-term positive effect on metabolic rate, helping dieters keep off the fat they've lost.

**Stimulates Metabolism** It promotes efficient metabolism by aiding the thermogenic (heat producing) effects of insulin. Insulin levels serve as a rough index of the availability of food calories, so it's not at all surprising that insulin stimulates metabolism.

HOW MUCH CHROMIUM PICOLINATE SHOULD I TAKE FOR OPTIMAL WEIGHT LOSS?

Clinical trials with 200 to 400 micrograms of chromium daily produced significant benefits. Larger individuals and those engaged in strenuous work or exercise may see better results with higher levels -- up to a maximum of 400 micrograms daily.

PUTTING IT ALL TOGETHER

The best thing about Chromium Picolinate is that it makes other sensible weight control efforts more effective. Many people report that they have tried diet and exercise before, but say that they didn't get good results until they added Chromium Picolinate. . . .

Chromium Picolinate, all by itself, isn't likely to make a fat person thin. But it can be the decisive component of an overall strategy for long-term weight control and, in the bargain, make an important contribution to good health.

****

(Exhibit A) (references omitted)

B. WEIGHT LOSS, FAT LOSS AND MUSCLE LOSS

or "How to Break the String of Yo-Yo Diets"

CLEARLY, THE KEY TO BREAKING THIS DISCOURAGING CYCLE OF EVER MORE FAT, EVER LESS MUSCLE, IS LOSING FAT WHILE PRESERVING--OR EVEN INCREASING--MUSCLE. . . .

This is precisely what Dr. Gilbert Kaats and his colleagues achieved in a recently completed study . . . .

One hundred fifty men and women were asked to join in a weight loss study. Roughly half were given supplemental Chromium Picolinate (200 or 400 micrograms chromium daily), while the others got a placebo. They were not placed on any specific diet or exercise regimen, although most were trying to lose weight. . . . After 72 days, these were the impressive results:

****

The changes in the placebo group were insignificant. However the Chromium Picolinate group, on average, lost over 4 pounds of fat while gaining nearly a pound and a half of lean muscle!

****

The review of clinical trials reported that supplementation with Chromium Picolinate:

-- reduced total serum cholesterol and LDL, the "bad" cholesterol
-- reduced elevated blood sugar levels and glycosylated hemoglobin in diabetics
-- significantly reduced body fat and increased muscle in exercising individuals.

****

Chromium is an essential nutrient that is in short supply in 90% of typical U.S. diets. . . .

CHROMIUM PICOLINATE: Take daily, 200 to 400 micrograms to preserve muscle while you lose weight

****

Chromium Picolinate has other important attributes:

-- preserving or enhancing muscle; it maintains or increases the metabolic rate making weight loss easier.
-- significantly lowering elevated serum cholesterol
-- significantly lowering elevated blood sugar
-- helping to control appetite. A great many people report reduced appetite, especially sugar cravings.

****

(Exhibit B)

C. CHROMIUM PICOLINATE:

The yeast-free BioActive Chromium with Important Clinically Proven Benefits

****

Chromium is vitally important to good health because it is essential to the efficient function of the hormone insulin. Poor responsiveness to insulin is very common and is linked with increased risk for overweight, heart disease, elevated blood fat, high blood pressure, and diabetes.

Yet chromium's nutritional status in the U.S. is very poor: 90% of American diets provide less than the minimal amount recommended by the National Academy of Sciences, and most nutritional forms of chromium are poorly absorbed.

Chromium Picolinate is well absorbed and highly bioactive. In clinical trials at major hospitals and universities it has been shown to:

significantly reduce body fat
help build lean, strong muscles
lower elevated cholesterol
reduce elevated blood sugar in diabetics

****

1 Complaint

By mechanisms that are not yet fully understood nutritional (trivalent) chromium is absolutely essential to the function of insulin.

****

A great many U.S. adults have poor insulin function. They produce normal or even elevated amounts of insulin, but their body's tissues are relatively insensitive to it. Indeed, recent studies show that at least one in four adults has reduced sensitivity to insulin.

The majority of these people don't become overtly diabetic because their pancreas compensates by secreting increased amounts of insulin. In these people, insulin insensitivity is a "silent" problem that can be diagnosed only by observing increased blood insulin levels and/or modest impairments of glucose tolerance.

There is increasing evidence that this "silent" insulin insensitivity is in fact a serious medical problem.

****

But there is now evidence that insulin insensitivity may itself lead to weight gain, owing to an impairment of "dietary thermogenesis. . . ."

Insulin insensitivity almost certainly also impairs the development of muscle.

****

**Diabetes** As noted, most people can compensate for modest impairments of insulin sensitivity by producing more insulin. But in some people, as insulin sensitivity continues to decline, the pancreas is unable to keep up with the increased need for insulin, and "adult-onset" (Type II) diabetes results. In this syndrome, there is a significant net reduction in insulin activity, resulting in persistent elevations of blood sugar even after an overnight fast. Adult-onset diabetes . . . is responsible for a tremendous toll in premature death and disability. Long-term diabetes can lead to heart disease, arterial disease (often requiring leg amputation), blindness, kidney failure, and nerve damage.

****

POOR CHROMIUM NUTRITION AND METABOLISM

Diets that are too high in fats and too low in fiber-rich unrefined foods, inadequate exercise, as well as overweight, are all major factors contributing to poor insulin responsiveness. Poor chromium nutrition also plays a vitally important role.

Refined American diets are very poor sources of chromium. The National Academy of Sciences has recommended a daily chromium intake of 50 to 200 micrograms. Yet studies by the U.S. Department of Agriculture indicate that 90% of Americans receive less than 50 micrograms daily--and 25% receive less than 20 micrograms!

This problem is compounded because most sources of chromium are not efficiently absorbed. . . .

In addition, there is evidence that many people may have defective chromium metabolism. . . . Diabetics also tend to have lower chromium levels.

In brief, impaired insulin sensitivity is very prevalent and is associated with increased risk for overweight, heart disease, diabetes, and high blood pressure.

Chromium, which is crucial for proper insulin function, is in short supply in most American diets, is often inefficiently absorbed, and may not be efficiently metabolized by many people.

THE SOLUTION: BIOACTIVE CHROMIUM

These considerations emphatically suggest the desirability of dietary chromium supplementation. But not all chromium supplements are equally effective. In clinical studies, inorganic chromium (*e.g.* chromic chloride) has been beneficial for mild impairments of glucose tolerance, but has not proven useful in overt diabetes or for lowering elevated cholesterol. In contrast, large intakes of brewer's yeast, a rich source of organically bound chromium, have been found useful for treating diabetes and high cholesterol. . . .

The most likely explanation is that some organic chromium complexes are more readily taken up by cells than is inorganic chromium.

****

CHROMIUM PICOLINATE

Scientists at the U.S. Department of Agriculture have developed an excellent, perhaps an ideal organic complex of chromium. . . . Chromium Picolinate thus proves exceptionally effective for achieving intestinal absorption and intracellular uptake of chromium.

****

(Exhibit C) (references omitted)

D. CHROMIUM PICOLINATE -- THE CLINICAL PROOF. . .

The initial studies with Chromium Picolinate have yielded exciting results:

**Physique Enhancement for Athletes**

Young male athletes engaged in an exercise program at Bemidji State University (Minnesota) received daily doses of Chromium Picolinate (200 micrograms chromium) or a matching placebo. After 6 weeks, the chromium group gained 44% more lean body mass than the placebo group. Even more striking, the chromium group lost 23% of its body fat as compared to only 7% in the placebo group. These differences were highly statistically significant.

A similar study has been conducted at Louisiana State University with men and women beginning weight-training students. A preliminary report indicates that Chromium Picolinate accelerated the increase in muscle size in both men and women, and, in the women, nearly doubled the increase in lean body mass.

****

**Cholesterol Reduction** In a double-blind crossover study conducted by the medical staff of San Diego's Mercy Hospital, people with elevated cholesterol received a daily dose of Chromium Picolinate providing 200 micrograms chromium, alternating with a matching placebo. After 6 weeks of chromium, LDL cholesterol . . . had dropped 10% . . . . Inorganic chromium has not been reported to lower elevated cholesterol.

****

**Adult-Onset Diabetes** A similar double-blind crossover trial was conducted at Mercy Hospital with Type II (adult-onset) diabetics. After 6 weeks of Chromium Picolinate (200 micrograms of chromium), fasting blood sugar was lowered by 18% . . .

This is the first time that a nutritional intake of chromium *per se* has been reported to improve glucose metabolism in overt diabetes. (Exhibit D) (references omitted)

E. Chromium Picolinate --The Results Speak For Themselves

Two well designed, well executed studies prove that Chromium Picolinate accelerates muscle growth and reduces body fat. Such a statement cannot be made for any other chromium compound.

A recent issue of MUSCLE & FITNESS presented an article calling attention to the newly proven anabolic role of chromium. Body builders have believed for

a long time that chromium helps build muscle. What is new is that scientists now have measured, during a clinical study, the actual gains that chromium produces.

It no longer makes any difference what people "think" about chromium or about the different forms of chromium because the facts are in -- facts determined by clinical tests conducted according to acceptable scientific standards. And they have shown that one form of chromium --Chromium Picolinate--does accelerate muscle growth. (Exhibit E)

F. Lose The Fat; Keep The Muscle With Chromium Picolinate.

**Here's Why You Need Chromium Picolinate.**

Like iron, calcium, and zinc, chromium is a nutritionally essential mineral. Its most biologically available form, Chromium Picolinate, can have nutritionally helpful effects on your health and fitness. Combining it with a lifestyle of low-fat eating and everyday exercise can improve both health and fitness.

**Lose Fat and Keep Muscle with Chromium Picolinate.**

Nine confirming scientific studies with humans and animals demonstrate a significant reduction in body fat when Chromium Picolinate is added to the diet. These studies also show a consistent trend toward increased lean muscle. Muscle burns calories, fat merely stores calories.

**Chromium Picolinate Helps Maintain A Normal Healthy Metabolism.**

Insulin has very important functions: It maintains the normal nutritional metabolism of protein (muscle building), carbohydrate (major energy source), and fat (energy storage). It also influences appetite control and calorie-burning. Insulin simply can't perform normally without an adequate supply of chromium.

**Chromium is Undersupplied in 90% of Adult Diets.**

The National Academy of Sciences recommends 50 to 200 micrograms of chromium daily. U.S. Department of Agriculture studies show that men get only 33 micrograms and women get only 25 micrograms, on average, from their food. So, help yourself stay lean and healthy. Choose low-fat meals; choose exercise that you enjoy; and choose Chromium Picolinate to supplement your daily diet. Do it for the healthy edge. Do it for life!

****

(Exhibit F)

G. "Lose the Fat; Keep the Muscle" with Chromium Picolinate. Millions of Americans are trying to lose weight and many succeed -- but only temporarily.

Typically, up to 30% of lost weight is muscle. This lowers your metabolic rate and slows calorie burning. Muscles burn calories even while you sleep; fat merely stores calories. This lowered metabolic rate makes it hard to keep lost pounds from creeping back. Result: the "yo-yo" syndrome in which weight is repeatedly lost and then regained. After each lose-gain cycle the proportion of fat increases. This can result in a permanently depressed metabolic rate, persistent overweight. . . and utter frustration.

To break this vicious cycle it is important to lose only fat while maintaining, or even increasing muscle.

Most diet plans not only don't work, they're counterproductive. Permanent weight loss requires a permanent commitment. Steps 1, 2, and 3 in the box [below] are endorsed by nearly all weight loss experts. Studies show that optimal chromium nutrition, Step 4, is also an effective part of long-term fat loss programs. Chromium is in short supply in 9 out of 10 American diets and it's absolutely essential for normal insulin function. Normal insulin activity is crucial for hunger control and

calorie-burning. Studies show that 200-400 micrograms of chromium daily, as Chromium Picolinate, results in significant fat loss while muscle tissue is maintained or even increased. Dr. Gil Kaats of San Antonio reports, "During six weeks on Chromium Picolinate, overweight volunteers lost more than four pounds of fat, while muscle increased by nearly a pound and a half."

FOUR STEPS TO A LEANER FIRMER BODY

1. Reduce Dietary Fat Consumption to No More Than 20% of Calories--Eating Fat Makes You Fat
2. Increase Dietary Fiber--Low in Calories; High in Nutrients
3. Get Regular Aerobic Exercise--and Burn Fat Calories!
4. Take Chromium Picolinate Daily--Lose the Fat; Keep the Muscle

(Exhibit G)

7. Through the means described in paragraph six, respondents have represented, expressly or by implication, that:

A. Chromium Picolinate significantly reduces body fat.
B. Chromium Picolinate causes significant weight loss.
C. Chromium Picolinate causes significant weight loss without dieting or exercise.
D. Chromium Picolinate causes long-term or permanent weight loss.
E. Chromium Picolinate increases lean body mass and builds muscle.
F. Chromium Picolinate significantly increases human metabolism.
G. Chromium Picolinate controls appetite and craving for sugar.
H. Chromium Picolinate significantly reduces total and LDL serum cholesterol.
I. Chromium Picolinate significantly lowers elevated blood sugar levels.
J. Chromium Picolinate is effective in the treatment and prevention of diabetes.
K. Ninety percent of U.S. adults do not consume diets with sufficient chromium to support normal insulin function, resulting in increased risk of overweight, heart disease, elevated blood fat, high blood pressure, and diabetes.

8. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

10. Through the means described in paragraph six, respondents have represented, expressly or by implication, that scientific studies demonstrate that Chromium Picolinate:

A. Significantly reduces body fat.
B. Causes significant weight loss.
C. Causes significant weight loss without dieting or exercise.
D. Causes long-term or permanent weight loss.
E. Increases lean body mass and builds muscle.
F. Significantly reduces total and LDL serum cholesterol.
G. Significantly lowers elevated blood sugar levels.
H. Is effective in the treatment and prevention of diabetes.

11. In truth and in fact, scientific studies do not demonstrate that Chromium Picolinate:

A. Significantly reduces body fat.
B. Causes significant weight loss.
C. Causes significant weight loss without dieting or exercise.
D. Causes long-term or permanent weight loss.
E. Increases lean body mass and builds muscle.
F. Significantly reduces total and LDL serum cholesterol.
G. Significantly lowers elevated blood sugar levels.
H. Is effective in the treatment and prevention of diabetes.

Therefore, the representations set forth in paragraph ten were, and are, false or misleading.

12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

[redacted]

***Lose the Fat***

***but Keep the***

***Muscle . . .***

# *Chromium Picolinate*

*At last there is a safe nutritional supplement that helps you lose unwanted fat more easily and quickly, while retaining vital muscle tissue. Now you can have a trimmer, firmer, leaner body.*

NUTRITION 21

NUTRITION21

1010 Turquoise Street, Suite 335

San Diego CA 92109 619/488-1021 FAX 619/488-7316

570019

570012

EXHIBIT A

1

Complaint

EXHIBIT A

## LOSE THE FAT BUT KEEP THE MUSCLE

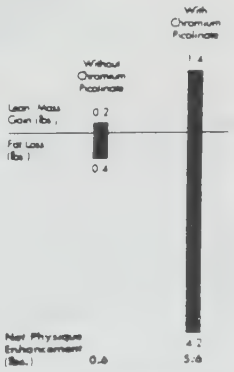
Most dieters who achieve significant weight loss lose far too much lean body mass (muscle and organ tissue). This not only diminishes strength and agility but also affects appearance. With less muscle, pleasing curves flatten, chests sink, arms and legs look spindly. Even worse, this lessened lean body mass lowers your metabolic rate, making it that much harder to keep the fat off permanently - the yo-yo syndrome!

There is now excellent scientific evidence that Chromium Picolinate can accelerate fat loss while helping to preserve or even increase muscle.

## CONVINCING NEW EVIDENCE

Overweight adults were recruited by a prominent San Antonio weight loss clinic to participate in a weight loss study (1). About half of the volunteers received supplemental Chromium Picolinate (200 or 400 micrograms chromium daily) while the others received placebos. Neither the participants nor the doctors evaluating them knew who was getting the chromium (a "double-blind" study). The volunteers were not placed on any specific diet or exercise regimen, although most of them were motivated to lose weight. After only 60 days, these were the impressive results:

The changes in the placebo group were negligible. But the Chromium Picolinate group, on average, lost over 4 pounds of fat while gaining nearly a pound and a half of lean muscle for a Net Physique Enhancement of 5.6 pounds.

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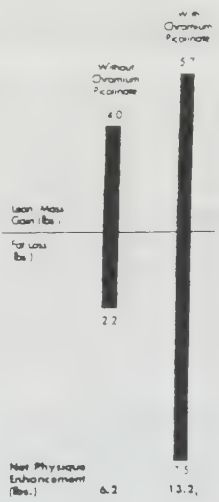
The effect in men alone was even more striking, with an average fat loss of [illegible] pounds. Interestingly, the greatest enhancement of muscle mass was seen in the older subjects, those above age 40, who gained 2.1 pounds of muscle while losing 4.4 pounds of fat. This is especially important since muscle tissue typically declines with age.

Another double blind-study was conducted in young off-season football players participating in a six-week weight-training program (2). The results were much the same: *more muscle, less fat* with Chromium Picolinate. Chromium Picolinate more than doubled the net benefits of exercise alone.

These findings are also confirmed by animal studies. Scientists at Louisiana State University recently reported that young pigs receiving Chromium Picolinate achieved 7% more muscle with 21% less body fat as compared to pigs on an identical diet not receiving Chromium Picolinate (3).

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570014

EXHIBIT A

## LEANER AND FIRMER

Because many people *gain* muscle with Chromium Picolinate, their weight loss in pounds doesn't accurately reflect the benefits of chromium. Most users report that even a modest weight loss as shown on the bathroom scale is accompanied by *lost inches and smaller clothing sizes.* They look and are leaner and firmer. Chromium Picolinate promotes *fat loss* while enhancing the muscle that assures a trim athletic physique.

## WHAT IS CHROMIUM PICOLINATE?

Chromium Picolinate is an exceptionally bioactive source of the essential mineral chromium. Chromium plays a vital role in "sensitizing" the body's tissues to the hormone insulin. Weight gain in the form of fat tends to impair sensitivity to insulin and thus, in turn, makes it harder to lose weight (4)

## HOW DOES CHROMIUM PICOLINATE WORK?

**Controls Hunger** Many people report that Chromium Picolinate helps to control appetite, especially sugar cravings. It is believed that chromium sensitizes the "glucostat" in the brain that monitors blood sugar availability and "tells" you when you're hungry or not hungry.

**"Spares" Protein** Insulin directly stimulates protein synthesis and retards protein breakdown in muscles (5, 6). Thus "protein-sparing" effect of insulin tends to fall off during low-calorie diets as insulin levels decline, resulting in loss of muscle and organ tissue. By "sensitizing" muscle to insulin, Chromium Picolinate helps to preserve muscle in dieters so that they "burn" more fat and less muscle. Preservation of lean body mass has an important long-term positive effect on metabolic rate, helping dieters keep off the fat they've lost.

**Stimulates Metabolism** It promotes efficient metabolism by aiding the thermogenic (heat producing) effects of insulin. Insulin levels serve as a rough index of the availability of food calories, so it's not at all surprising that insulin stimulates metabolism. [illegible]

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## HOW MUCH CHROMIUM PICOLINATE SHOULD I TAKE FOR OPTIMAL WEIGHT LOSS?

Clinical trials with 200 to 400 micrograms of chromium daily produced significant benefits. Larger individuals and those engaged in strenuous work or exercise may see better results with higher levels - up to a maximum of 400 micrograms daily.

## MORE IMPORTANT DIET ADVICE

Excellent chromium nutrition is an essential component of weight control. Here are other important keys to a trimmer body:

**Avoid Dietary Fat.** Remember this: *fat makes you 'fat'.* Dieticians traditionally have recommended overall calorie restrictions for weight control, but it's now clear that fat calories should be specifically avoided (9, 10). Why? Most ingested fat is quickly stored in your adipose (fatty) tissue. Once absorbed, it doesn't provide feedback control to "tell" you that you're not hungry. That's because it isn't directly available as an energy source for the brain. And, unlike carbohydrate or protein, it doesn't trigger the insulin-dependent thermogenic mechanisms that produce a compensatory, and therefore fat reducing increase in your metabolic rate.

In contrast, complex carbohydrates (as in bread, potatoes, fruits and vegetables) provide good feedback control of hunger while stimulating an increased metabolic rate - *mechanisms that are enhanced by Chromium Picolinate.*

For best results, keep dietary fat *below 20% of* total calories consumed. Olives, avocados, nuts, vegetable oil, and margarine are all extremely high in fat. However most other foods *not* of animal origin are quite low in fat and are great for dieters. Among animal foods, skinless white meat poultry and fish (prepared without frying!) are good, as are non-fat and low-fat yogurt and cottage cheese, skim and 1% milk, and egg whites (not yolks). When you must use oil, use it very sparingly.

**Regular Exercise.** Most people believe that the weight control benefits of exercise result merely from calories burned during exercise. But in fact, exercise also produces a [illegible]

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your metabolic rate that is quite important for weight control (11 12). Chromium Picolinate helps this effect because insulin plays an important role in increasing the metabolic rate (12). Regular aerobic exercise is best for enhancing metabolism and burning fat, while weight-lifting has a beneficial effect on metabolism by increasing muscle mass. Muscle cells use energy; fat cells merely store it.

### Calorie Restriction with Adequate Protein.

By avoiding fatty foods, getting regular exercise, and supplementing with Chromium Picolinate, some people can lose fat and substantially improve their physiques, even without any special effort to control their calorie intake. However, people who want to lose weight quickly, or who have a lot of fat to lose, or who have slow metabolisms, may wish to accelerate the process by restricting their calorie intake (that is, going on a diet). If you do substantially reduce your calorie intake, make sure that you get ample protein by including high-protein/low-fat foods in your diet - this is important along with Chromium Picolinate for minimizing loss of muscle. If you are severely restricting calories for weeks at a time, a doctor's supervision is essential. Remember that "quick fix" diets aren't likely to do you any permanent good unless you follow up with an abiding commitment to low-fat foods and exercise.

## PUTTING IT ALL TOGETHER

The best thing about Chromium Picolinate is that it makes other sensible weight control efforts more effective. Many people report that they have tried diet and exercise before, but say that they didn't get good results until they added Chromium Picolinate. Now they're enthusiastic about low-fat eating plus exercise and are ever so proud of their beautiful new bodies! When your efforts are rewarded by good results, you're more likely to keep trying.

Chromium Picolinate, all by itself, isn't likely to make a fat person thin. But it can be the decisive component of an overall strategy for long-term weight control and, in the bargain, make an important contribution to good health.

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EXHIBIT B

Nutrition 21

December 1991

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# WEIGHT LOSS, FAT LOSS AND MUSCLE LOSS
# or
# "How to Break the String of Yo-Yo Diets"

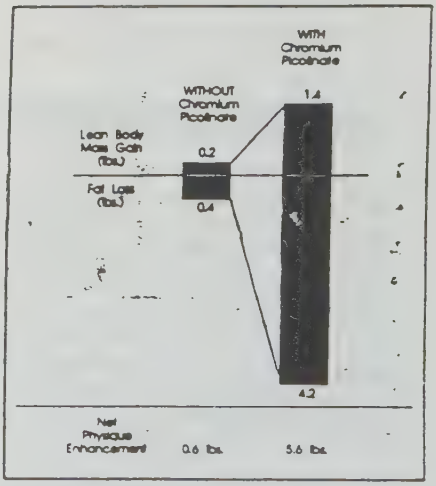
In his syndicated column *Nutrition News* dated October 16, 1991, the eminent nutritionist Dr. Jean Mayer states,

> "Evidence shows that the amount of fat stored in the body increases with each cycle of up-and-down dieting. When a person loses weight, both fat and muscle tissue are shed. When the weight is put back, however, it tends to be made up of a greater proportion of fat and less muscle, leaving the person 'fatter' than ever.
>
> "Consider a 5-foot-5 woman weighing 145 pounds, of which 51 pounds are fat, or 35 percent of her total body weight. After dieting for a few months, she loses 20 pounds — 13 in the form of fat and the rest as muscle tissue and water. She now weighs 125 pounds, including 38 pounds (30 percent) of fat. During the next six months, however, all the lost weight creeps back. But the regained weight is composed of 17 pounds of fat and only three pounds of muscle tissue and water. Thus, the woman weighs what she did originally, but she's carrying more fat— 55 pounds, or 38 percent. Each time the cycle is repeated, she's likely to become 'fatter'."

CLEARLY, THE KEY TO BREAKING THIS DISCOURAGING CYCLE OF EVER MORE FAT, EVER LESS MUSCLE, IS LOSING FAT WHILE PRESERVING—OR EVEN INCREASING—MUSCLE. (A more accurate term is lean body mass which includes not only muscle, but also organ tissue such as heart, liver, kidney, etc.)

This is precisely what Dr. Gilbert Kaats and his colleagues achieved in a recently completed study that was reported on October 11 at the annual meeting of the American Aging Association.

One hundred fifty men and women were asked to join in a weight loss study. Roughly half were given supplemental Chromium Picolinate (200 or 400 micrograms chromium daily), while the others got a placebo. They were not placed on any specific diet or exercise regimen, although most were trying to lose weight. Neither the volunteers nor their doctors knew who was getting the chromium which made it a "double-blind" study. After 72 days, these were the impressive results:




The changes in the placebo group were insignificant. However the Chromium Picolinate group, on average, lost over 4 pounds of fat while gaining nearly a pound and a half of lean muscle! A Net Physique Enhancement of 5.6 pounds.

The older people in this study (average age 55) did even better than the younger people (average

*Continued on page 3*

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## NOTED PHYSICIAN RECOMMENDS CHROMIUM PICOLINATE FOR DIABETIC PATIENTS

"I advise my diabetic patients to supplement their diet with a 200 microgram a day tablet of chromium picolinate, a supplement available at health food stores and pharmacies. It may help make it easier to control sugar levels."

With those words, Isadore Rosenfeld, M.D., joined the growing list of medical authorities who endorse the health benefits of Chromium Picolinate. The quote is from his new book, THE BEST TREATMENT (Simon & Schuster — 1991).

Dr. Rosenfeld is a clinical professor of medicine at the New York Hospital-Cornell Medical Center. He was a commentator on the long-running, popular, nationally syndicated television series "Hour Magazine" and author of several top-selling books on nutrition and health.

Other authors who endorse the superior qualities of biologically active Chromium Picolinate include Jeffrey Fisher, M.D., THE CHROMIUM PROGRAM (Harper & Row Publishers—1990); Sheldon Saul Hendler, M.D., Ph.D., THE DOCTORS' VITAMIN AND MINERAL ENCYCLOPEDIA (Simon & Schuster—1990); Edwin Heliniak, M.D., THE PRINCETON PLAN (St. Martin's Press—1990); Ronald Hoffman, M.D., THE DOCTORS BOOK OF HOME REMEDIES (Rodale Press—1990); Julian M. Whitaker, M.D., HOW TO LOSE WEIGHT WITHOUT DIETING and 99 SECRETS FOR A LONGER HEALTHIER LIFE (Phillips Publishing, Inc.—1991); and Richard A. Passwater, Ph.D., THE NEW SUPERNUTRITION (Pocket Books—1991).

## NUTRITION JOURNAL REVIEWS CHROMIUM PICOLINATE

THE JOURNAL OF APPLIED NUTRITION presented an extensive review of the clinical studies with Chromium Picolinate in its October issue (Vol. 43, No. 1, 1991). The Journal is the official publication of the International Academy of Nutrition and Preventive Medicine.

This publication is of special importance to the health food industry because it is the first scientific journal dedicated to the concept that increased dietary intakes of nutritional factors are efficacious against numerous human diseases.

Dr. Brian Leibovitz, editor, says, "The new focus of THE JOURNAL OF APPLIED NUTRITION is on supplementary macro- and micro-nutrients in the prevention and treatment of disease as well as in the maintenance of optimal health. An enormous, and ever-increasing volume of data supports this concept."

The review of clinical trials reported that supplementation with Chromium Picolinate:

— reduced total serum cholesterol and LDL, the "bad" cholesterol

— reduced elevated blood sugar levels and glycosylated hemoglobin in diabetics

— significantly reduced body fat and increased muscle in exercising individuals.

Because of its ability to enhance the activity of insulin, the article in the Journal suggests that additional clinical applications for Chromium Picolinate might be found, such as:

— improved wound healing
— improved immune response
— improved brain function
— reduced risk of heart disease.

## PIGS ON CHROMIUM PICOLINATE LOSE FAT AND GAIN MUSCLE

Chromium Picolinate supplemented piglets had 21% less carcass fat and 7% more muscle than unsupplemented pigs according to a report delivered to the American Association of Animal Science in August. All other factors were the same. Same breed of pigs. Same feed. Same living conditions. And, yes, they all ate like pigs. The Chromium Picolinate supplemented piglets also had lower cholesterol levels than controls. (Journal of Animal Science, Vol. 69, Supp. 1)

Dr. Lee Southern, Tim Page, and T.L. Ward conducted the study of carcass characteristics at the Department of Animal Science at Louisiana State University. In the trial they used chromium chloride, picolinic acid, and Chromium Picolinate. Only those animals supplemented with Chromium Picolinate showed favorable results.

Three separate carefully controlled studies have now been conducted with piglets, two at Louisiana State University and one at Oregon State University. It is reassuring to know that virtually the same beneficial effects demonstrated for humans are confirmed in animal studies.

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*Diabetes: Chippewa Indians Benefit from Chromium Picolinate* 3

# DRAMATIC IMPROVEMENT IN TYPE II DIABETICS

American Indians are especially vulnerable to Type II diabetes. The incidence of the disease has increased dramatically during the past 50 years.

Because Chromium Picolinate reduced elevated blood sugar in clinical studies at Mercy Hospital in San Diego, Dr. Gary Evans conducted an informal trial with five Chippewa Indians in northern Minnesota. Normal non-diabetic blood sugar readings range between 60 and 120 milligrams/deciliter. Supplementation with 200 micrograms a day of chromium from Chromium Picolinate produced these impressive results:

The potential health benefits are so striking that a full scale study will be undertaken in January. The results of the preliminary study are scheduled for publication in WESTERN JOURNAL OF MEDICINE in November.

IMPORTANT NOTE: Since Chromium Picolinate may reduce the requirement for insulin or diabetic drugs, all diabetics, whether Type I or Type II, should take Chromium Picolinate ONLY under the direction of their physician.

| | BLOOD SUGAR (mg/dl) | | BENEFICIAL | PERCENT |
|---|---|---|---|---|
| SEX | START | END | CHANGE | CHANGE |
| Male | 245 | 197 | - 48 | 19.5% |
| Female | 268 | 212 | - 56 | 20.8% |
| Female[a] | 357 | 137 | 220 | 61.6% |
| Female[b] | 136 | 89 | - 47 | 34.5% |
| Female[c] | 282 | 203 | - 79 | 28.0% |

a) This subject was a diabetic taking 50 units of insulin in the morning and 25 units more later in the day. Her insulin intake has been adjusted downward.

b) This subject has been taking a diabetic drug which has now been discontinued.

c) This subject had dropped to 147 after two weeks. She predicted this reading would be high because she had been "eating a lot of cookies."

## BREAKING THE STRING OF YO-YO DIETING

(continued from page 1)

age 36) which is why this study was reported at the American Aging Association meeting.

Chromium is an essential nutrient that is in short supply in 90% of typical U.S. diets. So try these simple rules to break the yo-yo syndrome:

CHROMIUM PICOLINATE: Take daily, 200 to 400 micrograms to preserve muscle while you lose weight

FAT: Stop storing it . . . by cutting daily consumption to less than 20% of daily calories

FAT: Start burning it . . . by exercising at least 30 minutes per day at least four days per week

CARBOHYDRATE: Eat fresh fruits, vegetables and whole grain products high in dietary fiber. Cut way down on foods that contain sugar

PROTEIN: Eat moderate amounts but make sure it's very low fat or no fat as in skim milk or non-fat yogurt.

Although preserving muscle is of overriding importance in solving the yo-yo diet problem, Chromium Picolinate has other important attributes:

—preserving or enhancing muscle; it maintains or increases the metabolic rate making weight loss easier.

—significantly lowering elevated serum cholesterol

—significantly lowering elevated blood sugar

—helping to control appetite. A great many people report reduced appetite, especially sugar cravings.

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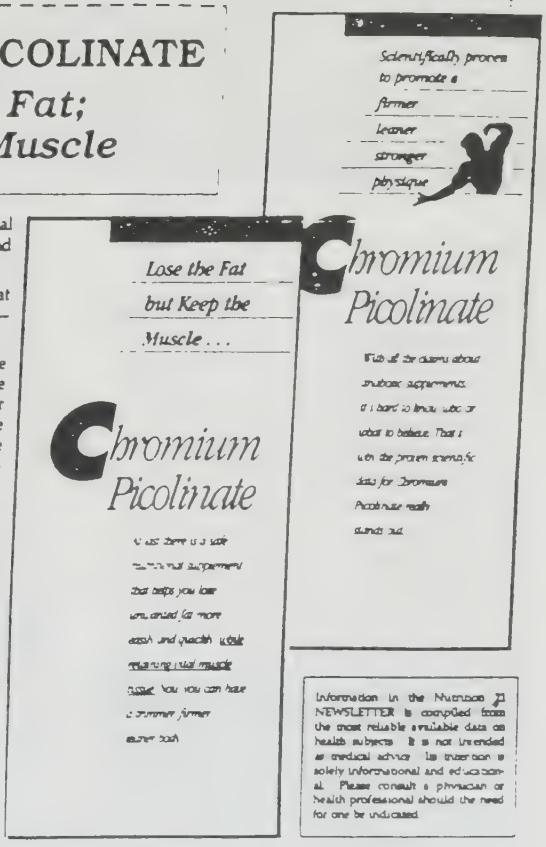
# CHROMIUM PICOLINATE
## *Lose the Fat; Keep the Muscle*




Three new "point-of-sale" promotional pieces are now available to distributors and retailers of Chromium Picolinate products:

1. A vivid yellow-and-black shelftalker that proclaims CHROMIUM PICOLINATE—"Lose the Fat; Keep the Muscle."

2. A "Weight Loss" folder that picks up the theme of "Lose the Fat but Keep the Muscle." Designed to fit into a regular business envelope or literature rack, the folder explains how Chromium Picolinate works to help reduce body fat while retaining and building muscle.

3. A "Muscle" folder describes the scientific tests that show significant gains in muscle mass result from supplementation with Chromium Picolinate. With the continuing concern about health hazards of anabolic steroids, a safe and effective nutrient is an important asset to athletes or anyone interested in maintaining a strong, lean physique. The folders and shelftalker are available in reasonable quantities free from Nutrition 21.

Chromium Picolinate is a biologically active form of trivalent chromium that is patented by the U.S. Department of Agriculture. It is licensed exclusively to Nutrition 21.

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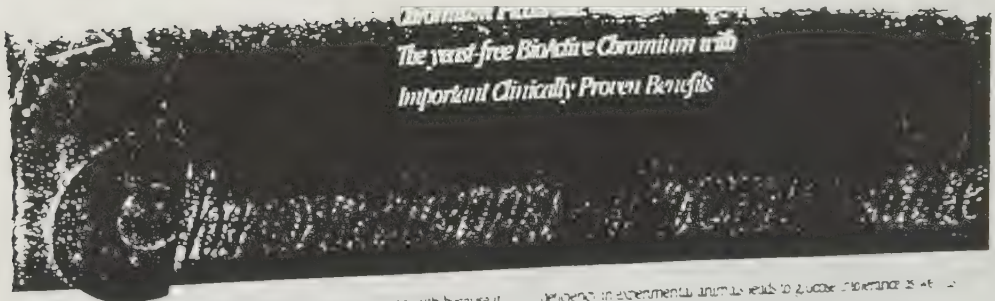



Chromium is vitally important to good health because it is essential to the efficient function of the hormone insulin. Poor responsiveness to insulin is very common and is linked with increased risk for overweight, heart disease, elevated blood fat, high blood pressure, and diabetes.

Yet chromium's nutritional status in the U.S. is poor. Over 90% of American diets provide less than the minimum amount recommended by the National Academy of Sciences, and most nutritional forms of chromium are poorly absorbed.

Chromium Picolinate is well absorbed and has been shown in clinical trials at many hospitals and universities to help:

- support healthy reduced body fat
- help build lean, strong muscles
- lower elevated cholesterol
- reduce excessive hunger and risk of diabetes

No other chromium supplement has shown these benefits. Chromium Picolinate is a patented form of chromium and is distributed under an exclusive license by Nutrition 21.

## THE INSULIN-CHROMIUM CONNECTION

The key role chromium plays in maintaining the efficient function of the hormone insulin. Insulin plays an essential role in the metabolism of all important food energy sources — carbohydrates, proteins, and fats. It is secreted by the pancreas in response to absorption of dietary carbohydrates and it helps the body's tissues to take up blood sugar (glucose) as an energy source. It also helps the proteins synthesize and retains the amino acids in skeletal muscle and other tissues. In effect, it serves as the body's chief anabolic hormone. Carbohydrate energy is available to support brain cells and anaerobic activity.

When insulin activity is seriously impaired, whether owing to reduced insulin secretion or reduced tissue responsiveness, the resulting syndrome is known as diabetes. This is characterized by persistently elevated levels of blood sugar and increased risk of cardiovascular disease, blindness, stroke, and damage to the kidneys, nerves, and arteries. Even when the impairment of insulin function is less severe, [illegible]

[illegible]

dependence on environmental factors leads to glucose intolerance as well as other effects typically seen in clinical diabetes, increased fatty deposits in arteries, impaired growth, and increased risk for infections. [illegible] even elevated in these animals, so impaired tissue response to insulin is clearly to blame.

## THE "GLUCOSE TOLERANCE FACTOR"

[illegible] studies in the early 1950's led to the hypothesis that there exists a specific nutritional substance essential for the proper function of the insulin molecule and the insulin receptor, promoting effective insulin action. However, the decades of subsequent research have failed to substantiate this. Glucose intolerance [illegible] can be induced in animals [illegible] by feeding diets low in chromium, and chromium has been shown to enhance the number of insulin receptors on cells. This [illegible] receptor function.

## THE PROBLEM — INEFFICIENT INSULIN FUNCTION

A great many U.S. adults have poor insulin function. The problem is not one of elevated amounts of insulin, but their body's tissues are resistant or insensitive to it. Indeed, recent studies show that at least one in four adults has reduced sensitivity to insulin.

The [illegible] these people [illegible] diabetes, because [illegible] pancreas is compensating by secreting increased amounts of insulin. [illegible] people [illegible] insensitivity is a very common problem that can be detected [illegible] even by increased blood insulin levels and/or modest impairments [illegible] glucose.

There is increasing evidence that the most [illegible] overweight [illegible] insulin resistance.

**Overweight/ Poor Physique** Overweight is a [illegible] insulin insensitivity. But there is now evidence that [illegible] [illegible] even [illegible] [illegible] [illegible]

EXHIBIT C

Insulin insensitivity almost certainly also impairs the development of muscle. Efficient insulin activity promotes protein synthesis and retards protein degradation in skeletal muscle and other tissues. Muscle wasting is a prominent feature of diabetes. Thus efficient insulin function is important for optimal anabolic activity.

**Heart Disease** A growing number of studies show that impaired insulin sensitivity, even in the absence of overt diabetes, is associated with a significantly increased risk for cardiovascular disease and premature death (7–10). Insulin insensitivity is an independent risk factor (not dependent on correlations with cholesterol, blood pressure, etc.), and is often associated with elevated triglycerides and high blood pressure (Reaven's syndrome). Since it usually doesn't cause symptoms that lead to its diagnosis, it is truly a silent killer.

**Diabetes** As noted, most people can compensate for modest impairments of insulin sensitivity by producing more insulin. But in some people, as insulin sensitivity continues to decline, the pancreas is unable to keep up with the increased need for insulin, and "adult-onset" (Type II) diabetes results. In this syndrome, there is a significant net reduction in insulin activity, resulting in persistent elevations of blood sugar even after an overnight fast. Adult-onset diabetes is by far the most common type of diabetes in the Western world, and is responsible for a tremendous toll in premature death and disability. Long-term diabetes can lead to heart disease, arterial disease (often requiring leg amputation), blindness, kidney failure, and nerve damage.

**Hypertension** Essential hypertension (the most common type of high blood pressure) is often associated with impaired insulin sensitivity (5,11). It is not yet known whether this impaired sensitivity is in fact a contributing cause of hypertension. But it is interesting to note that many measures which improve insulin sensitivity — weight loss, exercise, and high-fiber diets — also tend to lower elevated blood pressure.

## POOR CHROMIUM NUTRITION AND METABOLISM

Diets that are too high in fats and too low in fiber-rich unrefined foods, inadequate exercise, as well as overweight, are all major factors contributing to poor insulin responsiveness. Poor chromium nutrition also plays a vitally important role.

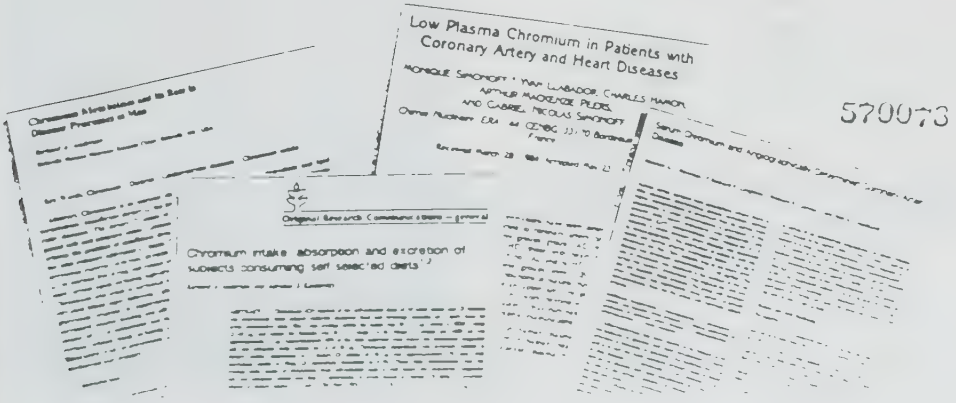
Refined American diets are very poor sources of chromium. The National Academy of Sciences has recommended a daily chromium intake of 50 to 200 micrograms. Yet studies by the U.S. Department of Agriculture indicate that 90% of Americans receive less than 50 micrograms daily — and 25% receive less than 20 micrograms (12).

This problem is compounded because most sources of chromium are not efficiently absorbed. The trivalent chromium ion, in its inorganic, unbonded form, as in chromic chloride (the form most commonly used in supplements and clinical studies), has a strong positive electrical charge and does not readily pass through biological membranes. Within the nutritional range of 50 to 200 micrograms, only about 1/2 of 1% of chromic chloride is absorbed (4), and intracellular uptake of the free chromic ion is poor.

In addition, there is evidence that many people may have defective chromium metabolism. Studies show that people with coronary artery disease have substantially lower serum chromium levels than those with healthy arteries (13,14). The observed differences are too large to be explained by dietary differences alone; evidently there is a flaw in the metabolism of chromium in these people — perhaps associated with a deficit in intestinal absorption and/or intracellular transport of chromium. Diabetics also tend to have lower chromium levels (15).

In brief, impaired insulin sensitivity is very prevalent and is associated with increased risk for overweight, heart disease, diabetes, and high blood pressure.

Chromium, which is crucial for proper insulin function, is in short supply in most American diets, is often inefficiently absorbed, and may not be efficiently metabolized by many people.


Low Plasma Chromium in Patients with Coronary Artery and Heart Diseases
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Chromium intake absorption and excretion of subjects consuming self selected diets

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## THE SOLUTION: BIOACTIVE CHROMIUM

These considerations emphasize the importance of the right form of chromium supplementation. But the amount of chromium supplied is also critical. In clinical studies, inorganic chromium (III) chloride has been beneficial for mild impairment of glucose tolerance, but it is not useful in severe diabetes or for lowering elevated cholesterol (16–17). In contrast, large intakes of brewer's yeast, a rich source of organically bound chromium, have been found useful for treating diabetes and high cholesterol (18–20). The greater effectiveness of the organic chromium complexes found in yeast may account for these beneficial results.

Chromium inorganic supplements appear to be poorly absorbed across biological membranes. However, some organically bound chromium forms of chromium have much greater membrane permeability, because they neutralize the positive charge of the chromium, and are more fat soluble. When researchers studied the effects of chromium complexes on insulin function in chromium-depleted rat tissue slices, they reported that many organic complexes of chromium were more effective than inorganic chromium in promoting insulin action (21). The most likely explanation is that some organic chromium complexes are more readily taken up by cells than is inorganic chromium.

While brewer's yeast is a good source of bioactive chromium, yeast chromium is not ideal as a supplemental source because of the large volume of yeast required, and because of the possibility of yeast allergy. That is why an effective yeast-free organic chromium supplement is an attractive alternative.

## CHROMIUM PICOLINATE

Scientists at the U. S. Department of Agriculture have developed an excellent, perhaps an ideal organic complex of chromium. Chromium Picolinate. Picolinic acid is a natural metabolite produced in the human liver and kidney. Because of its unique chemical structure, it forms strong chelates with transition metals such as zinc, manganese, and chromium (22). In addition to being very stable (even in acidic gastric juice, which breaks down most chelates), these picolinate complexes are electrically neutral (no positive charge) and fat soluble, which means that they can pass through cell membranes efficiently. Chromium Picolinate thus proves even more effective for achieving intestinal absorption and intracellular uptake of chromium.

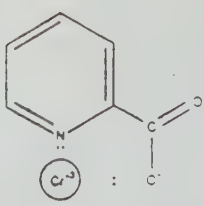
## THE REMARKABLE SAFETY OF CHROMIUM PICOLINATE

In light of the [illegible] chromium picolinate in these supplements [illegible] chromium, which is the most abundant nutritional supplement [illegible] the safest. [illegible] published study of THE ESSENTIAL MINERALS states that the acute single dose toxicity of an organic complex of chromium was 4,200,000 micrograms (4200 milligrams), compared to the recommended 50 to 200 micrograms. Test animals fed approximately 2,500 milligrams of organic chromium daily for eight weeks [illegible] experienced no adverse effects.

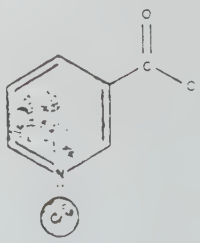
PRESENT KNOWLEDGE IN NUTRITION, published by the National Academy of Sciences, states that the safe and adequate daily dietary intake of chromium is between 50 and 200 micrograms. The RECOMMENDED DIETARY ALLOWANCES (10th edition, 1989) state that the lower limit of chromium intake is the lowest amount consistently consumed, and those consumed to have harmful effects.

Chromium Picolinate is no exception to this general rule. In acute toxicity studies, it was not possible to feed rats an amount of Chromium Picolinate sufficient to produce death or other evident sickness. The 400 milligram dose which the rats tolerated without incident would be equivalent, when adjusted for relative body surface area, to a dose of about 25 grams (25,000 milligrams) in a normal-sized human — over ten thousand times the nutritional amount.

Despite the remarkable safety of Chromium Picolinate, Nutrition 21 recommends a daily intake of 50 to 200 micrograms of chromium (III), and cautions against the use of more than 600 micrograms daily.



A molecule of picolinic acid binds to chromium in 2 positions and thus forms a strong "bidentate" chelate



A molecule of nicotinic acid (niacin) binds to chromium in only 1 position and thus forms a less stable complex

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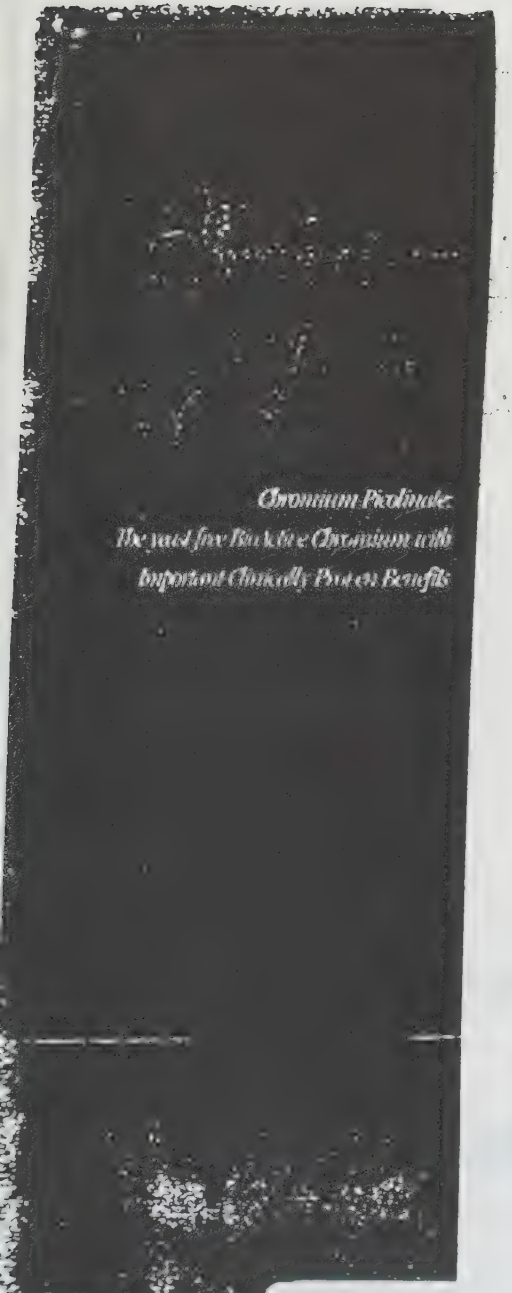
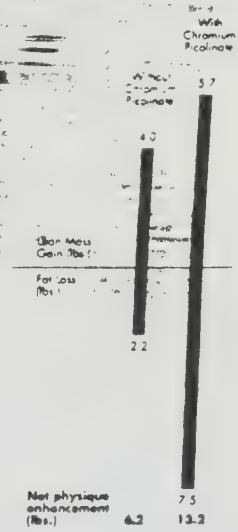



## CHROMIUM PICOLINATE — THE CLINICAL PROOF

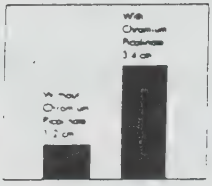
Since so little is known about chromium's metabolism and transport in the body, the only reasonable way to evaluate the [illegible] chromium supplement is by observing its effects in properly controlled clinical studies. The initial studies with Chromium Picolinate have yielded exciting results.

### Physique Enhancement for Athletes

Young male athletes engaged in an exercise program at Bernidji State University (Minnesota) received daily doses of Chromium Picolinate (200 micrograms chromium) or a matching placebo. After 6 weeks, the chromium group gained 44% more lean body mass than the placebo group. Even more striking, the chromium group lost 23% of its body fat as compared to only 7% in the placebo group. These differences were highly statistically significant(23).




A similar study has been conducted at Louisiana State University with men and women beginning weight-training students. A preliminary report indicates that Chromium Picolinate accelerated the increase in muscle size in both men and women, and, in the women, nearly doubled the increase in lean body mass.




*Increase of Chest + Arm + Thigh Measurements*

**For Animals** Scientists at LSU have reported that Chromium Picolinate added to diets of growing pigs at 100 - 200 ppg chromium yielded animals with 21% less fat and 18% larger pork chops (24). Studies are now underway in other types of livestock. Chromium Picolinate may offer an effective natural alternative to the use of synthetic hormones in the livestock industry.

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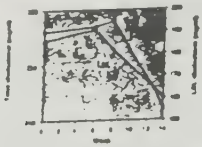
# EXHIBIT D

**Cholesterol Reduction** In a double-blind crossover study conducted by the medical staff of San Diego's Mercy Hospital, people with elevated cholesterol received a daily dose of Chromium Picolinate providing 200 micrograms chromium, alternating with a matching placebo. After 6 weeks of chromium LDL cholesterol (the dangerous kind) had dropped 10%, apolipoprotein B (a component of LDL) dropped 16% while apolipoprotein A$_1$ (a component of protective HDL) rose 11%. (Apolipoprotein B correlates with increased heart risk, whereas increased apolipoprotein A$_1$ is associated with lower risk. Thus, all of the observed changes suggest a lessened risk for heart disease. Inorganic chromium has *not* been reported to lower elevated cholesterol.



*Total and low-density lipoprotein cholesterol of 14 subjects given placebo followed by chromium picolinate supplements. The values depicted with the open squares are for total cholesterol and the units are on the left vertical axis. The values depicted with the closed squares are for low-density lipoprotein (LDL) cholesterol and the units are on the right vertical axis.*

**Reports from Consumers** A great many users of Chromium Picolinate report a marked reduction of sugar cravings. Many note an enhancement of mental energy levels. Others have noted improved gum health. These remarks are frequent enough that we believe they represent genuine effects. These possibilities will be addressed in future clinical studies. They are credible owing to the fact that insulin influences the function of most of the body's tissues.

**Cell Culture Studies** The insulin-potentiating action of Chromium Picolinate has also been documented in cell cultures. When rat muscle cells are pre-incubated with Chromium Picolinate, insulin-stimulated uptake of glucose and amino acids increases dramatically, as does insulin binding. Preincubation with chromium nicotinate or chromic chloride has no statistically significant effect on insulin function in these studies.[26]

**Uptake of Glucose and Leucine into Skeletal Muscle Cells Cultured with Various Forms of Chromium**

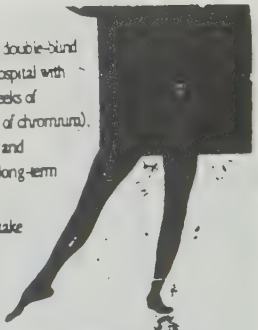
| | Chromium Compound in Culture Medium | | | |
|---|---|---|---|---|
| | None | Chloride | Nicotinate | Picolinate |
| Substrate | Radioactivity (CPM) | | | |
| Glucose | [illegible] | [illegible] | [illegible] | [illegible] |
| Leucine | [illegible] | 112±11 | [illegible] | [illegible] |

**Effect of Various Chromium Compounds on Total Receptor-Bound Insulin**

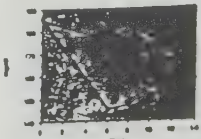
| | Chromium Compound in Culture Medium | | | |
|---|---|---|---|---|
| | [illegible] | [illegible] | [illegible] | [illegible] |
| Total receptor bound insulin (CPM) | [illegible] | [illegible] | [illegible] | [illegible] |

**Adult-Onset Diabetes** A similar double-blind crossover trial was conducted at Mercy Hospital with Type II (adult-onset) diabetics. After 6 weeks of Chromium Picolinate (200 micrograms of chromium), fasting blood sugar was lowered by 18%, and glycosylated hemoglobin (a measure of long-term glucose control) dropped 10%.[23]

This is the first time that a nutritional intake of chromium per se has been reported to improve glucose metabolism in overt diabetes.



*Clinical trials conducted by Deborah Heaton, award-winning bodybuilder and doctoral candidate at Louisiana State University, confirmed the physique enhancing effect of Chromium Picolinate.*



*Fasting blood glucose of eleven adult-onset diabetics during supplementation with chromium picolinate and placebo. The values depicted with the solid squares were obtained with the patients who started the study with placebo. The values depicted with the open squares were obtained with the patients who started the study with chromium picolinate (CrPic).*

Additional exciting clinical and animal studies with Chromium Picolinate – including one at a major diet center – have been completed or are in progress. The results of these studies must be kept confidential until they can be published in appropriate biomedical journals.

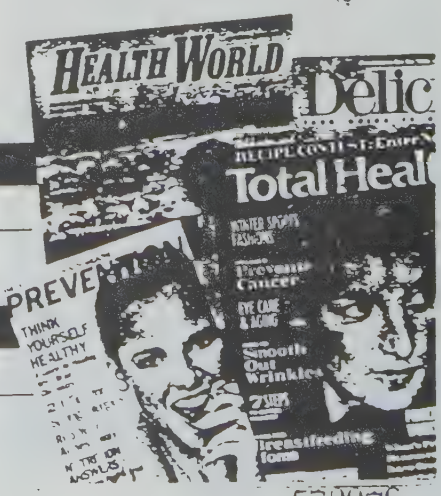


EXHIBIT D

## CHROMIUM PICOLINATE IN THE MEDIA

*The results of these exciting studies with Chromium Picolinate have been widely reported in the press:*

**Books** Chromium Picolinate has been recommended as the best mineral supplement of choice in these books by leading physicians and authors:

*The Doctors Vitamin and Mineral Encyclopedia* —
Sheldon Saul Hendler M.D. Ph.D. (Simon & Schuster)

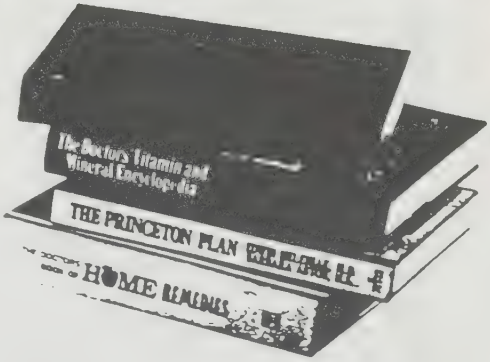
*The Chromium Program* — Jeffrey A. Fisher M.D. (Harper & Row)

*The Princeton Plan* — Edwin Helfenick M.D. (St. Martin's Press)

*The Doctors Book of Home Remedies* —
Ronald Hoffmann, M.D. (Rodale Press)

*The Purification Prescription* —
Sheldon Saul Hendler M.D. Ph.D. (William Morrow & Co.)

*The New Super Nutrition* —
Richard Passwater Ph.D. (Simon & Schuster)




**Magazines** The three million readers of *Cosmopolitan* (May 1985) read a discussion of Chromium Picolinate's value for dieters under the headline "A Miracle Mineral?" The cholesterol-reducing effect of Chromium Picolinate was highlighted in *The Ladies Home Journal*. *Longevity* has praised Chromium Picolinate as a safe alternative to anabolic steroids. *American Druggist* ran a similar article, while *Drug Store News* reported the findings on diabetes. Numerous publications for athletes and for health food shoppers have run feature articles on Chromium Picolinate, including, *Prevention, Better Nutrition, Whole Foods Today's Living, Total Health, Muscular Development, Runner's World*, and *VeloNews*.

**Newspapers** Many of the nation's most respected and widely read newspapers have devoted articles to Chromium Picolinate including LOS ANGELES TIMES, WASHINGTON POST, USA TODAY, SAN DIEGO UNION, SAN DIEGO TRIBUNE, SAN FRANCISCO CHRONICLE, DETROIT FREE PRESS, PHOENIX GAZETTE, and HOUSTON POST.

The tide of publicity should continue to roll as additional provocative clinical findings are published in the months and years to come.

This widespread favorable media attention translates into a broad and growing demand for Chromium Picolinate products.

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EXHIBIT D

## SOME FREQUENTLY ASKED QUESTIONS

**Q:** Is Chromium Picolinate "GTF"?

**A:** As previously noted, there is no good evidence for the existence of a specific chromium complex (the GTF) that mediates chromium's physiological effects. However, certain organic chromium complexes might reasonably be said to have "GTF activity" in the sense that they are more efficient than inorganic chromium in achieving intestinal absorption, intracellular uptake and insulin potentiation. Chromium Picolinate certainly has superb "GTF activity" in this sense. However, to avoid confusion we prefer to refer to Chromium Picolinate as "Bioactive Chromium."

It is interesting to note that brewer's yeast cells make picolinic acid. Perhaps picolinic acid is a constituent of the highly bioactive chromium complexes found in brewer's yeast.

**Q:** Isn't picolinic acid toxic?

**A:** When administered in very high doses to experimental animals, picolinic acid *per se* can exert toxic effects, possibly including a mutagen antagonist effect. This has no relevance whatever to any amounts of picolinic acid complexed with nutritional amounts of essential metals. An effective level of Chromium Picolinate providing 200 micrograms chromium is complexed to only 1.4 milligrams of picolinic acid — *far less than the human body makes every day*. As noted earlier, picolinic acid is a natural protein metabolite produced in the human liver and kidney. Furthermore, it should be noted that the characteristics and physiological effects of mineral picolinate complexes will be distinct from those of the picolinic acid. Neither we nor anyone else advocates the use of free picolinic acid as a nutritional supplement.

In pharmacological doses, nicotinic acid (niacin) results in distressing side effects and sometimes induces liver failure. But it would be unfair and certainly ridiculous to use this fact to call into question the safety of nutritional doses of chromium nicotinate. By the same token, the effects of high dose picolinic acid clearly have no bearing on the safety of nutritional doses of Chromium Picolinate.

**Q:** I've heard that some forms of chromium are toxic. What about Chromium Picolinate?

**A:** Hexavalent chromium is an unstable form of chromium that is extremely active as an oxidizing agent. In living cells, hexavalent chromium damages DNA and other vital components.

In contrast, trivalent chromium—the nutritional form of chromium—is very stable and is not absorbed virtually no matter how much is consumed. Even in amounts far beyond the nutritional range, chromium Picolinate contains only the trivalent nutritional form of chromium. In short, Solaray [illegible] Chromium Picolinate does not contain any of Chromium Picolinate that could feasibly be administered (many thousands of times higher than the nutritional dose) without any discernible adverse effects.

**Q:** Why haven't I've heard more about chromium?

**A:** Chromium is one of the newest essential trace elements. Unlike iron and iodine which have been known to be essential for over 150 years, the essentiality of chromium was discovered barely 30 years ago. Nevertheless, it is every bit as important as iron, iodine, or zinc for proper nutrition and good health.

Most previous clinical studies with chromium have used chromium chloride which isn't very well absorbed or utilized. Now that Chromium Picolinate is available as a much more bioactive supplemental source, you'll be hearing a lot about chromium in coming years.

**Q:** Why is chromium underemphasized in typical American diets?

**A:** Most minerals and trace elements that are essential for humans are also essential for plants; plants and certain adequate levels of these minerals because otherwise they couldn't grow. But iodine, selenium, and chromium are *not* required by plants, and once grown in soils depleted of these minerals will supply minimal amounts.

The refinement of flour strips it of much of this chromium content. The prominence of high calorie/low nutrition junk foods in typical American diets also dilutes daily chromium intake.

*This brochure is intended solely for the information of nutritional manufacturers and distributors, and is not intended for the general public. Nutritional supplement distributors are advised to consult their own legal counsel before using this information to advertise or promote products made with Chromium Picolinate.*

NUTRITION 21

NUTRITION 21

1010 Turquoise Street, Suite [illegible]

[illegible]

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EXHIBIT D

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EXHIBIT E

Nutrition 21

February 1990

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# Chromium Picolinate—The Results Speak for Themselves

***Two well designed, well executed studies prove that Chromium Picolinate accelerates muscle growth and reduces body fat. Such a statement cannot be made for any other chromium compound.***

by Richard Passwater, Ph.D.

A recent issue of MUSCLE & FITNESS presented an article calling attention to the newly proven anabolic role of chromium. Body builders have believed for a long time that chromium helps build muscle. What is new is that scientists now have measured, during a clinical study, the *actual* gains that chromium produces.

It no longer makes any difference what people "think" about chromium or about the different forms of chromium because the *facts* are in—facts determined by clinical tests conducted according to acceptable scientific standards. And they have shown that one form of chromium—Chromium Picolinate—does accelerate muscle growth.

This article will discuss the studies showing that Chromium Picolinate is specifically effective for building muscle and promoting fat loss.

## THE FIRST STUDY

Two clinical studies examined the effects of Chromium Picolinate on body composition in young male athletes. They were conducted recently at Bemidji (Minnesota) State University under the direction of Dr. Muriel Gilman and Guy Otte. Ten male students enrolled in a weight training course were randomly divided into two groups of five each. All of them worked out for 40 minutes twice a week.

One group received Chromium Picolinate (200 micrograms of chromium daily) while the other got a placebo, a similar looking capsule but without any active ingredients. It was a "double-blind" study. That is, the supplements were coded so neither the students nor the scientists evaluating them knew who was getting the chromium. Body content of fat and muscle, as well as biceps and calf circumferences, were recorded at the start of the study and again after two weeks and six weeks of supplementation.

At the end of the study the changes in the students' muscle size and body fat were measured. Then the code was broken and the scientists learned for the first time which of the students had been taking Chromium Picolinate and which had received placebos.

In six weeks, the Chromium Picolinate group gained an average of 3.5 pounds of lean body mass, compared to only 1/10 of a pound in the placebo group. This difference was highly statistically significant.

When the researchers analyzed all the differences between the two groups, they felt the results warranted further study with a larger number of participants.

## THE SECOND STUDY

The second study involved 31 football players during the off-season. They all engaged in a weight training program, four times a week, one hour per session. The athletes were divided randomly into two groups; one received Chromium Picolinate and the other a placebo. Again, it was a double-blind study. Body composition was determined before and after six weeks of supplementation.

When the study was completed, it was found that the group taking Chromium Picolinate gained an average of 5.7 pounds of

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EXHIBIT E

*Chromium Picolinate —The Results Speak for Themselves*

lean body mass, compared to 3.9 pounds in those getting a placebo. This 44% greater increase is statistically *very* significant

## BODY FAT LOSS

Even more intriguing was the effect on body fat. The group that had been taking Chromium Picolinate averaged a fat loss of 7.5 pounds. That was 22% of their total body fat. The other group lost an average of 2.2 pounds, only 6% of their total body fat. This difference also had a very high statistical significance.

The anabolic effect of good chromium nutrition can readily be attributed to the known anabolic effects of the hormone insulin. But the fat burning result with Chromium Picolinate, as demonstrated in Dr. Gilman's study, is not so readily predictable.

A likely possibility is that Chromium Picolinate enhances metabolism in "brown fat". This type of adipose tissue is found on the back and near many internal organs. It is activated after a carbohydrate-rich meal by a chain of events that requires insulin action on a portion of the brain known as the hypothalamus. Probably Chromium Picolinate makes the hypothalamus more sensitive to insulin.

Activated brown fat raises the metabolic rate by rapidly burning fatty acids and generating heat. Thus, Chromium Picolinate may promote fat burning while aiding the synthesis and retention of protein in muscle—certainly an ideal state of affairs for body builders!

## HOW IT WORKS

Picolinic acid is a mineral binder—a chelator—that is produced in the human body from protein. It is exceptionally effective for promoting the absorption and cellular uptake of minerals such as zinc, iron, manganese, and chromium. Dr. Gary Evans, formerly a research scientist for the United States Department of Agriculture and now a chemistry professor at Bemidji State University, is primarily responsible for demonstrating the superb nutritional value of mineral picolinates.

Chromium Picolinate is of special interest. Inorganic sources of chromium such as chromic chloride are very poorly absorbed, only about 1/2 of 1% of an oral dose. Animal studies conducted by Dr. Evans showed that Chromium Picolinate was five to 10 times better absorbed *and* retained than other forms of chromium tested.

The Chromium Picolinate molecule is highly stable and passes across cell membranes much more readily than inorganic chromium. This is in contrast to the compound of chromium and niacin which Dr. Walter Mertz has reported to be unstable. Animal studies also show that Chromium Picolinate is exceptionally safe. Fears that Chromium Picolinate might prove toxic because of an antagonism between niacin and picolinic acid are groundless. The standard daily dose of Chromium Picolinate provides only 1.4 milligrams of picolinic acid—less than 1/10 of the amount produced in the human body every day!

## Weight Control Results With Chromium Picolinate

The sharp reduction in body fat noted in the Bemidji State study was remarkable and unanticipated, and suggests that Chromium Picolinate may have value as a diet aid. The following outstanding and unequivocal case results were reported by Julia Ross, Executive Director of Recovery Systems

*L—— Mid-thirties, with a long history of obesity. She weighed 250 lbs. most of her adult life. She was not a dieter although she did Weight Watchers seriously three times.*

*(1) Refined carbohydrates and fats [illegible] mainstays of her diet*

*(2) She went on massive [illegible] High alcohol and tobacco consumption as an adult. These symptoms worse before meals.*

*(3) She had a long history of clinical hypoglycemia with associated severe and chronic headaches, dizziness and sugar cravings. These symptoms persisted even during the past nine years of stable weight loss (through the Overeaters Anonymous program) and a protein and vegetables (only) diet.*

*The first dose of Shape-Up (Chromium Picolinate) eliminated the headaches within 20 [illegible]. Within three days, the shakiness before meals was gone at 200 mcg in AM, and 200 mcg [illegible] PM.*

*Continued on last page*

EXHIBIT F

# Lose The Fat; Keep The Muscle With Chromium Picolinate.

**Here's Why You Need Chromium Picolinate.**

Like iron, calcium and zinc, chromium is nutritionally essential mineral. Its most biologically available form, Chromium Picolinate, can have nutritionally helpful effects on your health and fitness. Combining it with a lifestyle of low-fat eating and everyday exercise can improve both health and fitness.

**Lose Fat and Keep Muscle with Chromium Picolinate.**

Nine confirming scientific studies with humans and animals demonstrate a sign reduction in body fat when Chromium Picolinate is added to the diet. These studies also show a consistent trend toward increased lean muscle. Muscle burns calories, fat mo stores calories.

**Chromium Picolinate Helps Maintain A Normal Healthy Metabolism.**

Insulin has very important functions. It maintains the normal nutritional metabolism of protein (muscle building), carbohydrate (major energy source) and fat (energy storage). It also influences appetite control and calorie-burning. Insulin simply can't perform normally without an adequate supply of chromium.

**Chromium is Undersupplied in 90% of Adult Diets.**

The National Academy of Sciences recommends 50 to 200 micrograms of chromium daily. U.S. Department of Agriculture studies show that men get only 33 micrograms and women get only 25 micrograms, on average, from their food. So, help yourself stay lean and healthy. Choose low-fat meals, choose exercise that you enjoy, and choose Chromium Picolinate to supplement your daily diet. Do it for the healthy edge of life.

**CHROMIUM PICOLINATE**

*Call or write Nutrition 21 for a FREE brochure, "Hidden Fat in the American Diet": Nutrition 21, 1010 Turquoise Street-Pp2, San Diego, CA 92109 (619) 488-7423*

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EXHIBIT G

# *"Lose the Fat; Keep the Muscle"*

## *with Chromium Picolinate*

**FOUR STEPS TO A LEANER FIRMER BODY**

1. Reduce Dietary Fat Consumption to No More Than 20% of Calories – Eating Fat Makes You Fat
2. Increase Dietary Fiber – Low in Calories, High in Nutrients
3. Get Regular Aerobic Exercise – and Burn Fat Calories!
4. Take Chromium Picolinate Daily – Lose the Fat, Keep the Muscle

*lose only fat*

*while maintaining, or even increasing muscle.*

*under a variety of brand names in all health food stores and selected drug stores and supermarket*

## DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of the complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than the jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1.Respondent Nutrition 21 is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of California with its office and principal place of business at 1010 Turquoise St., Suite 335, San Diego, CA.

2.Respondent Selene Systems, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its office and principal place of business at 1010 Turquoise St., Suite 335, San Diego, CA. It is a general partner of Nutrition 21.

3.Respondent Herbert H. Boynton is President of Selene Systems, Inc., a corporation. He formulated, directed, and controlled the acts

and practices of Nutrition 21 and Selene Systems, Inc. His address is the same as that of Nutrition 21.

4.The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For the purposes of this order:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. *"Purchaser for resale"* shall mean any purchaser or other transferee of Chromium Picolinate, or of the right or license to sell Chromium Picolinate, either as Chromium Picolinate or as an ingredient of any other product, other than respondents, who sells, or who has sold, Chromium Picolinate, either as Chromium Picolinate or as an ingredient of any other product, to other purchasers or to consumers.

3. Unless otherwise specified, *"respondents"* shall mean Nutrition 21, a limited partnership, Selene Systems, Inc., a corporation, their successors and assigns and their officers; and Herbert H. Boynton, individually and as an officer of Nutrition 21 and Selene Systems, Inc.; and each of the above's agents, representatives, and employees.

4. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

### I.

*It is ordered*, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Chromium Picolinate or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting

commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such product reduces body fat;
B. Such product causes weight loss;
C. Such product causes weight loss without dieting or exercise;
D. Such product causes long-term or permanent weight loss;
E. Such product increases lean body mass or builds muscle;
F. Such product increases human metabolism;
G. Such product controls appetite or craving for sugar;
H. Such product reduces serum cholesterol;
I. Such product lowers elevated blood sugar levels;
J. Such product is effective in the treatment or prevention of diabetes; or
K. Ninety percent or any number or percentage of U.S. adults do not consume diets with sufficient chromium to support normal insulin function, resulting in increased risk of overweight, heart disease, elevated blood fat, high blood pressure, diabetes, or any other adverse effect on health, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

*It is further ordered*, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Chromium Picolinate or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding the benefits, performance, efficacy, or safety of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

*It is further ordered*, That respondents directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or

affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

IV.

*It is further ordered*, That respondents shall send by certified mail, return receipt requested, a copy of the attached Exhibit A to:

A. Each purchaser for resale of Chromium Picolinate with whom respondents have done business since January 1, 1993, within thirty (30) days of the date this order becomes final, to the extent that such purchasers are known to respondents through a diligent search of their records, including but not limited to computer files, sales records, and inventory lists. The mailing shall not include any other documents; and,

B. For a period of three (3) years following service of this order, each purchaser for resale with whom respondents do business after the date of service of this order who has not previously received the notice. Such notices shall be sent no later than the earliest of: (1) the execution of a sales or licensing agreement or contract between respondents and the prospective purchaser for resale; (2) the receipt and deposit of payment from a prospective purchaser for resale of any consideration in connection with the sale or licensing of chromium picolinate; or (3) the date on which respondents first ship chromium picolinate to the purchaser for resale.

V.

*It is further ordered*, That respondents, and their successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the

representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

*It is further ordered*, That respondents shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the partnership or corporation(s), that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the partnership or corporation name or address. Provided, however, that with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VII.

*It is further ordered*, That respondents shall deliver a copy of this order to all current and future principals, partners, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

*It is further ordered*, That respondent Herbert H. Boynton, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business

or employment or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number, and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

IX.

*It is further ordered*, That respondents shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

X.

This order will terminate on July 11, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

ATTACHMENT A

[To be printed on Nutrition 21 Stationery]

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

[Date]

Dear [purchaser for resale]:

This letter is to inform you that Nutrition 21 recently entered into a consent agreement with the Federal Trade Commission ("FTC") concerning certain claims we made for chromium picolinate, which the FTC has alleged to be deceptive. Although Nutrition 21 does not admit the FTC's allegations, we have agreed to have substantiation for any future claims about the effectiveness of chromium picolinate at the time we make those claims, and to stop making claims that scientific studies demonstrate the effectiveness of chromium picolinate unless those claims are true.

As a part of our settlement with the FTC, we also agreed to send this letter notifying our distributors, wholesalers and others to whom we sell chromium picolinate to stop using or distributing advertisements or promotional materials containing the challenged claims.

The FTC alleged that we made unsubstantiated claims relating to the effectiveness of chromium picolinate. Specifically, the FTC alleged that we did not have a reasonable basis for claims that:

-- Chromium Picolinate significantly reduces body fat;
-- Chromium Picolinate causes significant weight loss;
-- Chromium Picolinate causes significant weight loss without dieting or exercise;
-- Chromium Picolinate causes long-term or permanent weight loss;
-- Chromium Picolinate increases lean body mass and builds muscle;
-- Chromium Picolinate significantly increases human metabolism;
-- Chromium Picolinate controls appetite and craving for sugar;
-- Chromium Picolinate significantly reduces total and LDL serum cholesterol;
-- Chromium Picolinate significantly lowers elevated blood sugar levels;
-- Chromium Picolinate is effective in the treatment and prevention of diabetes; and
-- Ninety percent of U.S. adults do not consume diets with sufficient chromium to support normal insulin function, resulting in increased risk of overweight, heart disease, elevated blood fat, high blood pressure, and diabetes.

The FTC considers a reasonable basis for these types of claims to consist of competent and reliable scientific evidence.

In addition, the FTC alleged that we falsely claimed that scientific studies demonstrated many of the above claims about chromium picolinate.

We request your assistance by asking you to discontinue using, relying on or distributing any advertising or promotional materials for chromium picolinate that make any of the above claims unless and until you possess competent and reliable scientific evidence that substantiates the claims. Please also notify any of your retail or wholesale customers that they should follow the same procedures.

Thank you very much for your assistance.

Very truly yours,

_____

HERBERT H. BOYNTON
Chairman of the Board
Nutrition 21

IN THE MATTER OF

# COLUMBIA/HCA HEALTHCARE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3619. Consent Order, Oct. 3, 1995--Modifying Order, July 14, 1997*

This order reopens a 1995 consent order -- that permitted Columbia/HCA and Healthtrust, Inc., to merge and required the divestiture of the lease agreement -- and this order modifies the consent order by terminating Columbia/HCA's obligation to divest a commercial lease (the Infusamed Lease) for office space in a building in Utah.

## ORDER REOPENING AND MODIFYING ORDER

On February 18, 1997, Columbia/HCA Healthcare Corporation ("Columbia") filed its Petition Of Columbia/HCA Healthcare Corporation To Reopen And Modify Order ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. Respondent asks that the Commission reopen the proceeding in Docket No. C-3619 and modify the order to terminate the requirement that Columbia divest the commercial lease identified in Item 6 of Part II of Section A of Schedule B of the order ("the Infusamed Lease"). The Petition was placed on the public record for thirty days, until March 24, 1997, and no comments were received. For the reasons discussed below, the Commission has determined to grant Columbia's Petition.

Columbia states that this Petition is the second step of two procedural steps to remedy a minor error in the order. On December 5, 1995, Columbia filed a petition to reopen and modify the order to terminate the Utah Hold Separate requirements upon its completion of the divestiture of the Part I assets listed on Schedule B of the order, *i.e.*, the Utah hospitals themselves. The Part II assets listed on Schedule B consist of certain assets and businesses that were identified by Columbia during consent negotiations with Commission staff as being related to each of the listed Utah hospitals,[1] and included the Infusamed Lease. On May 15, 1996, the Commission

[1] The only distinction that the order expressly makes between the Part I and Part II assets is that the acquirer of a divested Part I hospital need not give the Commission prior notification of the re-sale of a Part II asset to anyone who also owns a hospital in the relevant market. *See* order, paragraph IV.F.

granted Columbia's December 5, 1995 petition. In addition, as of May 17, 1996, Columbia completed the divestitures of all of the Utah hospitals and related assets and businesses required by the order except for the Infusamed Lease Asset.

As explained in the Petition,[2] the leased space in question is used by Infusamed, a home health care company providing infusion and pharmacy services that was owned by Healthtrust, Inc. when it was acquired by Columbia. The order does not require Columbia to divest the Infusamed business. It also appears that the lease was not part of the business of Pioneer Valley Hospital, with which it was identified as a relevant asset. Specifically, Columbia explains that, although the Infusamed program was located temporarily at Pioneer Valley Hospital to enable it to register with the state of Utah and secure necessary licenses, it was subsequently separately incorporated and was not in fact part of the competitive package comprising the Pioneer Valley Hospital Assets.

Columbia claims that the order should be reopened and modified on the grounds of changed conditions of fact. Specifically, Columbia asserts that there was a mutual mistake of fact during consent negotiations. According to Columbia, during consent negotiations, both Columbia and the Commission were under the impression that the Infusamed Lease Asset was intrinsically related to Pioneer Valley Hospital, one of the Schedule B hospital assets. In reality, Columbia claims, the Infusamed Lease Asset was not "related" to Pioneer Valley Hospital in any sense that is competitively meaningful in terms of that hospital specifically or the relevant acute care inpatient hospital services market in Utah generally. As a result of this mistake, Columbia asserts that there has been a "constructive change of fact" which warrants correction by reopening and modifying the order to eliminate the requirement that Columbia divest the Infusamed Lease Asset.[3]

Columbia also asserts that reopening and modifying the order to eliminate its obligation to divest the Infusamed Lease Asset is in the public interest. Columbia states that forcing it to divest the Infusamed Lease will not further the original purposes of the order. Columbia also states that it will be burdened by unnecessary compliance obligations that will impede its ability to compete in the relevant Utah

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[2] Petition at 3 & Exhibit D.

[3] In support, Columbia cites the Commission's decision in Saint-Gobain/Norton Industrial Ceramics Corporation, Docket No. C-3673, Order Reopening and Modifying Order (November 19, 1996) (mutual mistake caused a "constructive change of fact" justifying a modification).

acute care hospital market. Further, Columbia states that a forced divestiture will cause significant and unforeseen harm to competition for the provision of home health services by interfering with the ongoing business of the Infusamed regional home health care company.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45 (b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[4]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), 1979-83 Transfer Binder, FTC Complaints and Orders, (CCH) ¶22,007, p. 22,585 ("Damon Letter"), at 2. For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed

[4] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

Columbia has not met its burden of showing that changed conditions of fact require reopening and modifying the order. First, the Commission disagrees with Columbia's assertion that the mistaken inclusion of the Infusamed Lease Asset was a mutual mistake by both parties to the consent negotiations. In deriving the list of related assets and businesses to be divested by Columbia along with the core divestiture assets required to be included as the Part I assets of Schedule B (*i.e.*, which Utah hospitals should be divested), the Commission relied on the representations of Columbia that each one of the three separate lease assets identified by Columbia for inclusion on Part II, Section A, of Schedule B (*i.e.*, Items 3 and 4 as well as Item 6, the Infusamed Lease Asset) was related to the business of Pioneer Valley Hospital. It was only when Columbia negotiated its divestiture agreement with Paracelsus Healthcare Corporation, which acquired, among other things, the Pioneer Valley and Davis hospitals in Utah, that Columbia realized its error and also ascertained that Paracelsus did not want the Infusamed Lease Asset. As the Commission stated in Saint-Gobain: "Oversights made unilaterally by respondents do not constitute changed conditions of fact within the meaning of Section 5(b) of the FTC ACT."[5] The

[5] Saint-Gobain/Norton Industrial Ceramics Corporation, Docket No. C-3673.

mistake in this case was made unilaterally by Columbia and was not a mutual mistake of fact.

More significantly, however, this case does not present the kind of situation that the Commission recognized as establishing a "constructive" change of fact in Saint-Gobain. Application of the "constructive" changed facts ground for reopening a final order is limited to situations where, as in Saint-Gobain, the order misnames, mislabels or misidentifies a person, place or thing, and this error incorporated in the order prevents the respondent from complying with the order as written, so that the purposes of the order cannot be achieved. In these situations, the error will typically involve a single fact, the truth or accuracy of which is easily and objectively verifiable, *e.g.*, whether an individual is or is not an officer of a particular corporation, or whether an asset is located at "105 Wright Bros. Drive" or "150 Wright Bros. Drive." In these circumstances, reopening and modification is necessary to allow achievement of the order's remedial purposes. Unlike the situation presented in Saint-Gobain, Columbia is not prevented from complying fully with the order as written, nor would divestiture of the Infusamed Lease Asset frustrate the order's purposes. Accordingly, Columbia has not demonstrated that reopening of the order is compelled on grounds of changed condition of fact.

Columbia has, however, met its burden of showing that public interest considerations warrant reopening and modifying the order to eliminate the requirement to divest the Infusamed Lease Asset. Columbia has met its burden of showing an affirmative need to reopen the proceeding caused by the continued operation of the order. Columbia has shown that in view of its divestiture of Pioneer Valley Hospital (the hospital with which the Infusamed Lease Asset was identified as a related asset), the Pioneer Valley Hospital acquirer's lack of interest in the Infusamed Lease Asset, and the lease's lack of competitive significance in the relevant acute care hospital market, continuing to require Columbia to divest the lease is burdening it with unnecessary expense in terms of achieving the order's remedial purposes, and is having a negative impact on its ability to compete. Columbia has also shown that requiring it to divest the Infusamed Lease Asset will cause harm to competition in the market for the provision of home health services. The Commission's complaint did not identify any competitive problems in the market for home health services and, accordingly, the Commission sought no relief in this

market. Requiring Columbia to divest the lease in light of a lack of interest by the acquirer of the other divested assets, and the lack of any allegation in the complaint that a competitive problem exists in the home health services market, would impede competition in that market.

Where the potential harm to the respondent outweighs any further need for the order, the Commission may modify the order in the public interest to allow the respondent to retain the relevant assets.[6] Because the Infusamed Lease Asset has been shown to have no competitive significance in the acute care hospital market in Utah, there is no need for Columbia to divest the lease. The remedial purposes identified in the order have already been achieved by the divestitures that have taken place. Further, requiring Columbia to divest the Infusamed Lease Asset will cause harm to competition for the provision of home health services. The harm and costs to Columbia associated with the continuing requirement to divest the lease appear to be significant, while there do not appear to be any benefits associated with requiring the divestiture.

Accordingly, *It is ordered,* That this matter be, and it hereby is, reopened; and

*It is further ordered,* That the order in Docket No. C-3619, be, and it hereby is, modified by deleting the asset identified as Schedule B, Section A, Part II, Item 6: "Lease of 7,134 sq. ft., 150 Wright Bros. Drive, Suite 540, Salt Lake City, Utah 84116" from the list of assets to be divested.

Commissioner Azcuenaga and Commissioner Starek concurring in the result only.

## CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission reopens the order against Columbia/HCA Healthcare Corporation under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), to eliminate the requirement that Columbia/HCA divest an ordinary commercial lease of a 7143 square foot office suite on the ground that reopening and modifying the order is in the public interest. I agree with the result but not with the reasoning of the majority.

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[6] *See* S.C. Johnson & Sons, Inc., Docket No. C-3418, Order Reopening Proceeding and Modifying Order (November 8, 1993) (order modified on public interest grounds to eliminate requirement to divest remaining international Renuzit assets not in the relevant market and not wanted by the acquirer of the divested North American Renuzit assets); T&N plc, Docket No. C-3312, Order Reopening Proceeding and Modifying Order (November 13, 1991) (order modified on public interest grounds to permit respondent to retain inventory not wanted by the acquirer).

The majority is correct that a showing of affirmative need is required before an order will be reopened under the public interest standard, and only after such a showing of affirmative need does the Commission balance the public interest reasons for and against the modification. *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (Mar. 29, 1983). Commission Rule 2.51(b), 16 CFR 2.51(b), provides that the petition must be supported by affidavits containing "specific facts" justifying the reopening and modification of an order and cautions against "conclusory" justifications. Because Columbia/HCA failed to make the requisite showing of affirmative need under Rule 2.51(b), I cannot agree with the majority that the petition should be granted under the public interest standard.

Finding affirmative need, the majority states: "continuing to require Columbia to divest the lease is burdening it with unnecessary expense in terms of achieving the order's remedial purposes, and is having a negative impact on its ability to compete." Order at 5. The affidavit filed in support of Columbia/HCA's petition contains the bare assertion that the expenditure of time and other resources (presumably to find a buyer for the lease) will impede its ability to compete in the hospital market.[1] It is virtually always foreseeable at the time a consent agreement is signed that a divestiture will entail "time and other resources" to accomplish. An order need not be reopened and modified on the basis of a circumstance that is foreseeable at the time that a consent order is signed. *See* Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986); *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1378 (9th Cir. 1992).

Columbia/HCA does not assert, much less support, a particular cost of leaving the requirement to divest the lease in the order. This omission alone is sufficient ground to deny the petition under the public interest standard. On this point, the Commission's decision is tantamount to waiving the requirements of Rule 2.51(b) that a petition must be supported with particularity. It seems to me that the requirements of Rule 2.51(b) are there for good reason, and I see no reason to waive them.

[1] The entire explanation provided in the supporting affidavit is as follows: "Columbia/HCA will suffer unforeseen competitive harm if it is forced to divest the Infusamed Lease Asset. Columbia/HCA is extremely unlikely to find a buyer for the lease, which will terminate in five months. Meanwhile, the required expenditure of time and other resources will impede Columbia/HCA's ability to compete effectively, particularly in the Salt Lake Area acute care hospital market. Finally, a forced divestiture will interfere with the ongoing business of the Infusamed regional home health care company."

The majority's substantive discussion of affirmative need is contained in one paragraph. Order at 4-5. After stating its conclusion that the petitioner has shown affirmative need, the majority refers in one sentence to three circumstances to bolster its conclusion: the already completed divestiture of Pioneer Valley Hospital, the hospital acquirer's asserted lack of interest in the lease, and the "lack of competitive significance [of the lease] in the relevant acute care hospital market." Order at 4-5. None is explained. Pioneer Valley Hospital was divested, as required by the Commission's order, to Paracelsus Healthcare Corp., except for the lease in question, which was listed among the "Pioneer Valley Assets" to be divested. It is at best unclear why a partial divestiture justifies elimination of the remaining divestiture obligation. Surely this is not a precedent the majority would like to establish for other cases.

Second, the majority relies on "the Pioneer Valley Hospital acquirer's lack of interest" in the lease. Assuming the truth of this conclusion, it is not at all clear why it should be relevant. Columbia/HCA asserts in a single sentence that Paracelsus did not want the lease in question. Petition Para. 8. In the past, the Commission has been rigorous in probing assertions like this. Its failure to do so here is an indication that the Commission thinks the lease is competitively insignificant, which, indeed, is the next circumstance to which the majority refers as a basis for granting the petition. The majority's reliance on the "lack of competitive significance [of the lease] in the relevant acute care hospital market" amounts to a finding that the Commission made a mistake in requiring divestiture of the lease. But for the assumption that the lease was competitively significant, there would have been no possible reason to require divestiture in the first place.

Finally, the majority states that divestiture of the lease "will cause harm to competition in the market for the provision of home health services." Order at 5. This asserted harm is entirely unexplained,[2] no doubt because the market for home health services was not alleged in the complaint and is not otherwise at issue in the order that Columbia/HCA seeks to have changed. Presumably, the majority

[2] The closest the majority comes to an explanation is: "Requiring Columbia to divest the lease in light of a lack of interest by the acquirer of the other divested assets, and the lack of interest by the acquirer of the other divested assets, and the lack of any allegation in the complaint that a competitive problem exists in the home health services market, would impede competition in that market." Order at 5. The complaint also lacks any allegation that a competitive problem exists in the market for commercial real estate in Salt Lake City, just to take one of any number of examples, but that hardly justifies changing an order that addresses the market for acute care hospital services.

would not so lightly assume harm to competition in a market it has not studied or previously identified if the majority were deciding liability. To do so in this context undermines the Commission's analytical standards.

The petitioner asserts that the petition should be granted on the basis of mutual mistake of fact (constructive change of fact), citing Saint-Gobain/Norton Industrial Ceramics Corp., Order Reopening and Modifying Order, Docket No. C-3573 (November 19, 1996). On that ground, I concur in the result.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN THE RESULT

The order in this case requires respondent to divest assets in several areas of the country, as a remedy for the likely anticompetitive effects of respondent's acquisition of Healthtrust, Inc. - The Hospital Company. One of the assets required to be divested is the "Infusamed Lease," an office space in Salt Lake City from which respondent's Infusamed subsidiary provides infusion and pharmacy services.

Respondent has petitioned to reopen and modify the order to eliminate the Infusamed Lease from the schedule of assets to be divested. Respondent claims that both parties to the consent settlement of this matter (*i.e.,* both respondent and the Commission) labored under the erroneous assumption that the Infusamed Lease was a vital part of Pioneer Valley Hospital -- one of the primary assets that respondent was required to divest -- when in fact the Infusamed Lease has no critical relationship to the Hospital. Arguing that this mutual error regarding the Infusamed Lease constitutes a "constructive change of fact," respondent bases its request on our ruling last fall in Saint- Gobain/Norton Industrial Ceramics Corp.[1] -- the case in which we articulated the concept of a "constructive change of fact." Alternatively, respondent contends that the public interest requires the deletion of the Infusamed Lease from the divestiture assets.

I reach the same conclusion as my colleagues: respondent has made the case for modifying the order. The Infusamed Lease is not critically related to Pioneer Valley Hospital and should not have been included in the assets to be divested. I am comfortable reaching this

[1] Docket No. C-3673 (Order Reopening and Modifying Order, Nov. 19, 1996).

result either on a "constructive change of fact" basis or on the ground that it is in the public interest to grant the requested modification.

In the present order, however, the majority concludes that respondent has not shown a "constructive change of fact" within the parameters outlined in Saint-Gobain. First, my colleagues "disagree[] with Columbia's assertion that the mistaken inclusion of the Infusamed Lease Asset was a mutual mistake by both parties to the consent negotiations."[2] The majority tries to bolster this conclusion by observing that "the Commission relied on the representations of Columbia that each one of the three separate lease assets identified by Columbia for inclusion [in the relevant schedule to the consent order] was related to the business of Pioneer Valley Hospital. . . . The mistake in this case was made unilaterally by Columbia and was not a mutual mistake of fact."[3]

But as I understand the facts, both respondent and the Commission were under the misimpression that the Infusamed Lease was sufficiently related to Pioneer Valley to require inclusion in the set of divestiture assets. That the Commission may have "relied" on respondent's representations to this effect changes nothing: with or without such reliance, the fact remains that both parties to the consent agreement -- Columbia/HCA and the Commission -- entertained an incorrect view of the Infusamed Lease. This mistake was no less "mutual" than was the error (concerning the status of certain Carborundum managers) at the heart of the "constructive change of fact" doctrine that we announced in Saint-Gobain.[4]

The majority's second reason for rejecting respondent's "constructive change of fact" claim is even more perplexing. The majority states: "[T]his case does not present the kind of situation that the Commission recognized as establishing a 'constructive' change of fact in Saint-Gobain. Application of the 'constructive' changed facts ground for reopening a final order is limited to situations where, as in Saint-Gobain, the order misnames, mislabels or misidentifies a person, place or thing, and this error incorporated in the order prevents the respondent from complying with the order as written, so that the purposes of the order cannot be achieved. In these situations,

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[2] Order Reopening and Modifying Order at 4 (July 14, 1997).

[3] *Id.*

[4] Nor, I suspect, did the Commission "rely" any less on respondent's representations in Saint-Gobain than in the present case. Indeed, if the Commission had done an independent fact-finding concerning the Carborundum personnel -- rather than relying on respondent's representations -- it is highly likely that there never would have been an error concerning the Carborundum managers.

the error will typically involve a single fact, the truth or accuracy of which is easily and objectively verifiable . . ."[5]

I search in vain for language in our Saint-Gobain order to support the gloss my colleagues have put on it here. Nothing in that order speaks to the singularity of the fact at issue or to its easy or objective verifiability. With regard to prevention of compliance with the order and frustration of its purposes, the only sentence pertinent to this issue in our Saint-Gobain order[6] is hardly authority for the almost categorical limitation that my colleagues announce today. All of the majority's *post hoc* qualifications on the meaning of Saint-Gobain seem designed to mitigate the impact of a decision with which they may have become uncomfortable. If that is the majority's purpose, however, it finds no source in the text of Saint-Gobain itself.

In any event, even if my colleagues are correct that the kind of mistake cognizable under the "constructive change of fact" doctrine "will typically involve a single fact, the truth or accuracy of which is easily and objectively verifiable," why is the Infusamed Lease situation not a suitable candidate? Although my colleagues are silent on this question, the critical facts surrounding the Infusamed Lease do not differ materially (in terms of objective verifiability, etc.) from the facts concerning the Carborundum managers in Saint-Gobain, and I find the present case a worthy candidate for application of the constructive change of fact doctrine.

Having rejected changed conditions of fact as a basis for modifying the order, the majority turns to respondent's assertion that public interest considerations also warrant the requested relief. Although I agree that it is in the public interest to excuse respondent from an obligation to divest the Infusamed Lease, I cannot agree that respondent has satisfied the "affirmative need" standard, which has become enshrined in the Commission's public interest order modifications despite having no rightful place in our jurisprudence.[7]

Indeed, were my colleagues to apply their affirmative need criterion with any sort of rigor, respondent's public interest argument would fail. For example, I would be interested to learn what evidence supports the majority's observation that "continuing to require

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[5] Order Reopening and Modifying Order, *supra* n.2, at 4.

[6] "Saint-Gobain cannot, therefore, comply with the terms of paragraph 5.d. of the Hold Separate." In the Matter of Saint-Gobain/Norton Industrial Ceramics Corp., Order Reopening and Modifying Order, *supra* n.1, at 4.

[7] For one directly pertinent illustration of my oft-stated views on affirmative need, *see* In the Matter of Columbia/HCA Healthcare Corp., Docket No. C-3619, Order Reopening and Modifying Order (May 15, 1996) (Statement of Commissioner Roscoe B. Starek, III, Concurring in the Result).

Columbia to divest the [Infusamed] lease is burdening it with unnecessary expense in terms of achieving the order's remedial purposes, and is having a negative impact on its ability to compete."[8] Moreover, how has Columbia shown that "requiring it to divest the Infusamed Lease Asset will cause harm to competition in the market for the provision of home health services"?[9] And what is in the record to support the majority's conclusion that "[r]equiring Columbia to divest the lease in light of a lack of interest by the acquirer of the other divested assets, and the lack of any allegation in the complaint that a competitive problem exists in the home health services market, would impede competition in that market"?[10] Absent more information and analysis regarding home health services in the Salt Lake City area, how could the Commission possibly know that requiring respondent to divest the Infusamed Lease would "impede competition" in that "market"? Respondent's petition furnishes little in the way of substantiation, nor does the order issued today go beyond the conclusory.

Nevertheless, it is clearly in the public interest to grant the requested relief. The Infusamed Lease was included among the divestiture assets through an error, and -- entirely apart from the role that this error plays under the constructive change of fact doctrine -- the public interest requires that it be rectified. This conclusion is derived from a simple, straightforward balancing of the reasons to delete this divestiture requirement against the reasons to retain it. Consideration of the "affirmative need" question simply muddles the analysis.[11]

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[8] Order Reopening and Modifying Order, *supra* n.2, at 5.

[9] *Id.*

[10] *Id.*

[11] As I have noted elsewhere, "[a] case such as this one -- in which the affirmative need 'evidence' is paltry, but the requested relief fairly cries out to be granted -- demonstrates why the Commission should summon the will to jettison the 'affirmative need' concept and embrace explicitly a simple cost/benefit balancing approach to order modifications pursuant to the 'public interest' standard of [Commission] Rule 2.51." Statement of Commissioner Roscoe B. Starek, III, Concurring in the Result, *supra* n.7, at 2.

IN THE MATTER OF

# CLASS RINGS, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3701. Consent Order, Dec. 20, 1996--Modifying Order, July 21, 1997*

This order reopens a 1996 consent order -- that prohibited the respondents from having any interest in or assets of Gold Lance, Inc. -- and this order modifies the consent order by setting aside a provision prohibiting the respondents, for one year, from employing or seeking to employ any person who is or was employed during 1996 by Gold Lance, Inc. or Town & Country Corporation.

## ORDER REOPENING AND MODIFYING ORDER

On May 29, 1997, respondents Commemorative Brands, Inc., formerly known as Class Rings, Inc. ("Class Rings"), and Castle Harlan Partners II, L.P. (collectively "CBI") filed a Petition of Commemorative Brands, Inc. and Castle Harlan Partners II, L.P. to Reopen and Modify Order ("Petition"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. In its Petition, CBI requests that the Commission reopen the order in Docket No. C-3701 ("order") to set aside paragraph V, which prohibits CBI, for a period of one year, from employing or seeking to employ any person who is or was employed at any time during 1996 by Gold Lance, Inc. ("Gold Lance") or by Town & Country Corporation ("Town & Country") in any position relating to the design, manufacture, or sale of class rings (the "Employment Restriction").

For the reasons discussed below, the Commission has determined that CBI has demonstrated changed conditions of fact sufficient to require the reopening and modification of the order.[1]

In its Petition,[2] CBI requests that the Commission modify the order to set aside the Employment Restriction contained in paragraph V of the order.[3] The restrictions in paragraph V expire by their own

[1] Because the Commission has determined to grant CBI's Petition based on change of fact, we do not reach a determination with respect to CBI's assertion that the provision should be set aside under the separate public interest standard.

[2] In support of its Petition, CBI provided the affidavit of Jeffrey H. Brennan, President and Chief Executive Officer of Commemorative Brands, Inc. ("Brennan Affidavit").

[3] Paragraph V provides that Castle Harlan and Class Rings:
shall not, for a period of one (1) year from the date this order becomes final, employ or seek to employ any person who is or was employed at any time during calendar year 1996 by Gold Lance or by Town & Country in any position relating to the design, manufacture, or sale of Class Rings.

terms on January 9, 1998, one year from the date on which the order became final.[4]

CBI bases its Petition on changed conditions of fact and public interest considerations.[5] The changes of fact alleged by CBI include the fact that Gold Lance is no longer a stand-alone competitor, but is now a part of the industry's market leader, Jostens, Inc. ("Jostens"). Since the order became final, Jostens, the largest producer of class rings in the country, purchased Gold Lance from Town & Country. CBI contends that, as a result of the acquisition, the Employment Restriction no longer operates to achieve the purpose for which it was designed but has the unintended effect of precluding CBI from competing against Jostens for Gold Lance employees.[6]

In addition to change of fact, CBI argues that it is in the public interest to grant its Petition because the Employment Restriction now has the unintended effect of preventing Gold Lance employees, many of whom will soon be out of work due to the Jostens' acquisition, from obtaining employment with CBI, which desires to offer jobs to qualified individuals. The Petition asserts that such a result is inconsistent with the purpose of the order and is unduly harmful to these employees.[7]

## STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.[8]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so

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[4] Order ¶ V.

[5] CBI does not assert that any change of law requires reopening the order.

[6] Petition ¶¶ 5-12. Brennan Affidavit ¶¶ 4-6.

[7] Petition ¶¶ 13-15.

[8] S. Rep. No. 96-500, 96th Cong., 1st Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[9] In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order.[10] For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order."[11] Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification.[12] The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.[13]

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order."[14] If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.[15]

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[9] Hart Letter at 5; 16 CFR 2.51.

[10] Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), 1979-83 Transfer Binder, FTC Complaints and Orders, (CCH) ¶ 22,007, p. 22,585 ("Damon Letter"), at 2.

[11] *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983).

[12] Damon Letter at 2.

[13] Damon Letter at 4.

[14] S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify).

[15] *See Federated Department Stores, Inc. v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

CBI HAS DEMONSTRATED CHANGED CONDITIONS OF FACT THAT REQUIRE THE REOPENING AND MODIFICATION OF THE ORDER

CBI's Petition demonstrates that Jostens's acquisition of Gold Lance eliminates the need for the Employment Restriction contained in paragraph V of the order. The complaint in this matter charged that on May 20, 1996, Class Rings, an entity controlled by Castle Harlan, agreed to purchase all of the class ring assets from two companies, Town & Country and CJC Holdings, Inc. and CJC North America, Inc. ("CJC").[16] At the time of the proposed merger, CJC was manufacturing class rings. Town & Country, another leading producer of commemorative jewelry, manufactured class rings through its class ring divisions Gold Lance and L.G. Balfour Company, Inc. ("Balfour").[17] Under the consent order, Castle Harlan, in effect, was prohibited from acquiring the Gold Lance business but permitted to acquire the Balfour business as well as the CJC business from Town & Country.[18] Paragraph V of the order, the subject of the Petition, was included in the order to ensure that Town & Country, through its subsidiary Gold Lance, remained a viable independent competitor in the manufacture and sale of class rings.[19]

On April 21, 1997, Jostens, the largest producer of class rings in the United States, announced that it had purchased Gold Lance from Town & Country. Such a change, which was not foreseen at the time the Commission issued the order, results in the Employment Restriction having the unintended effect of precluding CBI from competing against the market leader Jostens for a significant number of skilled and experienced workers in this industry.

Gold Lance is no longer in need of the protection afforded by the Employment Restriction. Therefore, the acquisition of Gold Lance by Jostens constitutes a change of fact that eliminates the need for the Employment Restriction and requires the reopening and modification of the order to set aside paragraph V.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order be, and it hereby is, modified to set aside paragraph V as of the effective date of this order.

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[16] The complaint alleged that the proposed merger would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Complaint ¶¶ 24-25.

[17] Complaint ¶¶ 1-8.

[18] Order ¶ II.

[19] Order ¶ II.

IN THE MATTER OF

# SOFTSEARCH HOLDINGS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3759. Complaint, July 28, 1997--Decision, July 28, 1997*

This consent order requires, among other things, Dwight's Energydata, a subsidiary of Softsearch, to license a set of complete well history and production data to a Commission-approved buyer, which then will be an independent competitor. In addition, the Commission has appointed a trustee to find a licensee and to complete the required divestiture.

## *Appearances*

For the Commission: *George Cary, Frank Lipson, Phillip Broyles* and *William Baer*.

For the respondents: *Sandy Pfunder, Gibson, Dunn & Crutcher*, Washington, D.C. and *Neil Inus, Vincent & Elkins*, Washington, D.C.

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Dwight's Energydata, Inc. ("Dwight's"), a wholly-owned subsidiary of respondent SoftSearch Holdings, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, has entered into an agreement to merge with Petroleum Information Corporation ("PI"), a wholly-owned subsidiary of respondent GeoQuest International Holdings, Inc., a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

### THE RESPONDENTS

PARAGRAPH 1. Respondent SoftSearch Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and

principal place of business located at 1202 Estates Drive, Suite A, Abilene, Texas. Its wholly-owned subsidiary, Dwight's Energydata, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1633 Firman Drive, Suite 100, Richardson, Texas. Dwight's Energydata, Inc., holds a 37 percent interest in Graphic Information Technologies, Inc., ("GITI") a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware.

PAR. 2. Respondent GeoQuest International Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 5333 Westheimer Drive, Houston, Texas. Its principal subsidiary is Petroleum Information Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5333 Westheimer Drive, Houston, Texas.

PAR. 3. At all times relevant herein, each of the respondents or their predecessors, has been and is now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

## THE MERGER

PAR. 4. In July 1995 respondents agreed to merge the businesses of Dwight's and PI.

## THE RELEVANT MARKETS

PAR. 5. One relevant line of commerce in which to evaluate the effects of the merger is the sale or licensing of well data. "Well data" means information in any media concerning the location, permitting, drilling or completion of any oil and gas well located in the United States, and related information.

PAR. 6. One relevant line of commerce in which to evaluate the effects of the merger is the sale or licensing of production data. "Production data" means information in any media concerning the locations of, and volume of oil, gas, or water produced from any oil or gas well located in the United States, and related information.

PAR. 7. One relevant section of the country in which to evaluate the effects of the merger is the United States as a whole.

PAR. 8. The relevant markets set forth in paragraphs five, six, and seven are highly concentrated, whether measured by Herfindahl-Hirschmann Indices or two-firm and four-firm concentration ratios. Dwight's and PI are actual competitors in the relevant markets. Dwight's and PI are the only competitive providers of well and production data for many areas of the country. The merged Dwight's/PI will have the largest market share in the relevant markets.

PAR. 9. Respondents are the only firms that have extensive, multi-state collections of historical information on oil and gas properties. Firms lacking similar databases cannot effectively compete in the relevant markets. Assembling a database that matches the database possessed by either respondent would be very difficult, expensive, and time consuming. This factor makes timely and effective entry into the relevant markets difficult and unlikely.

## EFFECTS OF THE MERGER

PAR. 10. The merger may substantially lessen competition in the relevant markets in the following ways, among others:

(a) By eliminating direct competition between Dwight's and PI;
(b) By increasing the likelihood that respondents will unilaterally exercise market power; and
(c) By increasing the likelihood of, or facilitating, collusion or coordinated interaction;

each of which increases the likelihood that the prices of well data and production data will increase. The merger is also likely to lead to reduced service for customers. The merger may lead to a decline in technological innovation due to loss of rivalry in making product enhancements. The merger may further lead to a deterioration in the accuracy of the data compiled due to loss of competition in securing and verifying data.

## VIOLATIONS CHARGED

PAR. 11. The merger described in paragraph four constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. 45.

PAR. 12. The merger described in paragraph four, if consummated, would constitute a violation of Section 7 of the Clayton Act, 15 U.S.C. 45, and Section 5 of the FTC Act, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed merger of Dwight's Energydata, Inc., a wholly-owned subsidiary of SoftSearch Holdings, Inc. ("respondent"), and Petroleum Information Corporation, a wholly-owned subsidiary of GeoQuest International Holdings, Inc. ("respondent"), having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent SoftSearch Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at Suite A, 1202 Estates Drive, Abilene, Texas. Its wholly-owned subsidiary, Dwight's Energydata, Inc. is a corporation

organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1633 Firman Drive, Richardson, Texas. Dwight's Energydata, Inc. holds a 37 percent interest in Graphics Information Technologies, Inc. ("GITI"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. GITI has no operating assets, but since the formation of Tobin Data Graphics LLC in June 1994, GITI has held a 50% percent interest in Tobin Data Graphics LLC.

2. Respondent GeoQuest International Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 5333 Westheimer Drive, Houston, Texas. GeoQuest is a holding company and has no operating assets. Its principal subsidiary is Petroleum Information Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5333 Westheimer Drive, Houston, Texas.

3. Tobin Data Graphics LLC is a Texas limited liability company, with its office and principal place of business located at 114 Camp Street, San Antonio, Texas.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents, and the proceeding is in the public interest.

## ORDER

### I.

*It is ordered*, That, as used in this order, the following definitions shall apply:

A. *"Dwight's"* means SoftSearch Holdings, Inc., its directors, officers, employees, agents and representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by SoftSearch Holdings, Inc., and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. *"PIC"* means GeoQuest International Holdings, Inc., its directors, officers, employees, agents and representatives, successors,

and assigns; its subsidiaries, divisions, groups and affiliates controlled by GeoQuest International Holdings, Inc., and the respective directors, officers, employees, agents, and representatives, successors and assigns of each.

C. *"TDG"* means Tobin Data Graphics LLC, its directors, officers, employees, agents and representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Tobin Data Graphics LLC, and the respective directors, officers, employees, agents, and representatives, successors and assigns of each.

D. *"Graphics Information Technologies, Inc.,"* is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1560 Broadway, Suite 903, Denver, Colorado.

E. *"HPDI, L.L.C.,"* is a Texas limited liability company with its office and principal place of business located at 9300 Research Boulevard, Suite 306, Austin, Texas.

F. *"Respondents"* means Dwight's and PIC.

G. The *"Merger"* means the proposed combination of the businesses of Dwight's Energydata, Inc., and Petroleum Information Corporation.

H. *"Commission"* means the Federal Trade Commission.

I. *"Relevant product"* means well data and production data.

J. *"Well data"* means information in any media concerning the location, permitting, drilling activity or completion of any oil or gas well located in the United States, including U.S. territorial waters, and related information.

K. *"Well header data"* means the following information regarding an oil, gas, or other well: API Number, Surface and Bottom Hole Locations (Township, Range, Section, Area, Block, Section, Survey, Abstract, and Footage Calls), Lease Name and ID, Well Number, Permit Number, Operator Name, Total Depth, Completion or Plugging Date, Final Status, Class, Field Name, Elevation, and Dwights ID.

L. *"Production data"* means information in any media concerning the identity, location and volume of fluids, including, but not limited to, oil, water, and natural gas, produced from or injected into any oil or natural gas well or leases located in the United States, including U.S. territorial waters, and related information.

M. *"Acquirer"* means the person or persons approved by the Commission to acquire the specified data.

N. *"Divest"* means to grant a perpetual, world-wide license to the Acquirer, with the right, subject to the terms of this order, to use, combine with other information, reproduce, market, assign or otherwise transfer, and sublicense the specified data.

O. *"Specified data"* means digital well data and production data that are included in one or more of the Schedule A products and the well header data received by Dwight's from TDG under the Data Exchange and Sales Representative Agreement entered into on June 1, 1995.

P. *"Schedule A products"* means those products listed in Schedule A of this order.

Q. *"Shared employee"* means any person whose salary or other compensation for services rendered is paid, directly or indirectly, by both TDG and Petroleum Information/Dwight's.

R. *"Petroleum Information/Dwight's"* means the entity that is created as a result of the Merger.

S. *"Royalty-based compensation"* means a payment to a vendor or licensor based, directly or indirectly, upon the revenue generated by the sale of the vendor's or licensor's well data or production data.

II.

*It is further ordered*, That:

A. Following completion of the Merger, respondents shall divest the specified data, absolutely and in good faith, at no minimum price, consistent with the provisions of this order, either to (1) HPDI, L.L.C., pursuant to, and in accordance with the time frame set out in paragraph 2(a) of, the License Agreement for specified data entered into between Dwight's and HPDI, L.L.C., dated September 18, 1996 (Exhibit A hereto); or (2) another person that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. Provided, however, if, at the time the Commission determines to make this order final, the Commission notifies respondents that HPDI, L.L.C., is not an acceptable acquirer, then respondents shall not divest the specified data to HPDI, L.L.C. Upon expiration of the divestiture period described in paragraph III.B.4 of the order, respondents shall have no further obligation to divest.

B. The purpose of the divestiture of the specified data is to ensure the continued use of the specified data in the same type of business

in which the specified data is used at the time of the Merger, and to remedy any lessening of competition resulting from the Merger as alleged in the Commission's complaint.

C. After the specified data has been divested, respondents shall not exercise any right they may have, whether at common law, in equity, or in bankruptcy or reorganization (including through obtaining any equity interest in a reorganized debtor) or otherwise, to terminate the license granted under this order or to seek to have such license terminated, or to require, or seek to require, the Acquirer or its successor or assignee to return the specified data.

III.

*It is further ordered*, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the specified data, the Commission may, on the date this order becomes final, or at any time thereafter, appoint either Ben C. Burkett, II, of Burkett Consulting, Dallas, Texas, ("Burkett") or someone else to act as trustee to divest the specified data. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission either (1) shall select Burkett to be the trustee under the terms of a trustee agreement as set out in Exhibit B hereto; or (2) shall select another trustee subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee, if not Burkett, shall be a person with experience and expertise

in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee, other than Burkett, within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the specified data.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order. Such agreement may contain provisions requiring the trustee to protect against unauthorized disclosure or use of the specified data before the specified data is divested.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the Court; provided, however, the Commission may extend this period only two (2) times for up to twelve (12) months each time.

5. The trustee shall have full and complete access to the specified data and to the personnel, books, records and facilities related to the specified data or to any other relevant information, as the trustee may reasonably request. The trustee may require that a repository be established to allow for examination of the specified data by prospective Acquirers. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall make reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the Acquirer as set out in paragraphs II and III of this order, provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, the trustee shall submit all such bids to the Commission, and if the Commission determines to approve more than one such acquiring entity either for the whole data set or for any of the same parts of the data set comprising the specified data, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission. The Commission may approve divestiture of parts of the specified data to different acquiring entities, but in no event will there be more than one Acquirer for either the whole data set comprising the specified data, or any of the same parts of the data set comprising the specified data.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, and at reasonable fees, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the specified data.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from

misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

10. Consistent with the terms of this order, the Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be reasonably necessary or appropriate to accomplish the divestiture required by this order. Notwithstanding paragraph IV.G herein, such additional orders or directions may provide for, among other things, giving the Acquirer the right to use the record layouts specified in paragraph IV.A when sublicensing the specified data, with provisions that insure against confusion of the origin of the data.

11. The trustee shall have no obligation or authority to operate or maintain the specified data.

12. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

*It is further ordered*, That:

A. The specified data shall be delivered to the Acquirer in machine-readable, usable form in the record layouts in Annex 1 of this order for well data, Annex 2A of this order for production data, Annex 2B of this order for the Texas oil test (W10) file; Annex 2C of this order for the Louisiana oil test (DM1R) file; and Annex 3 of this order for Petroleum Data System (PDS) data, which support the Dwight's Petroleum Reservoirs CD-ROM. Respondents shall provide the Acquirer the specified data in the computer code set in which the records are maintained or in industry standard (8-bit) ASCII, at the Acquirer's option.

B. Respondents shall provide the Acquirer with all existing technical system documentation and user documentation relating to the specified data. Such documentation includes, but is not limited to, a description of all data elements in Dwight's Well Data System, a description of the data file in Dwight's A-File (unpacked) file; a description of the test file in the Texas oil test (W10) file; a

description of the test file in the Louisiana oil test (DM1R) file; Dwight's "Data Item Manual;" and the keys to all codes used by Dwight's, whether maintained in machine-readable format, hard copy, or microfilm.

C. Respondents shall provide Acquirer with data that is current as of the date of the divestiture for all data elements that were included in any Schedule A product on the date on which the Commission accepts this order for comment, to the extent that data exist on any Dwight's computer records.

D. Respondents shall make no claim to ownership, title, or interest in any product derived from the specified data by the Acquirer.

E. Respondents are not required to provide the Acquirer the right to sublicense well identifier codes, field and reservoir codes, and operator codes, to the extent that such codes are unique to Dwight's. However, respondents shall provide Acquirer with the right to provide its licensees with a cross-reference to enable a licensee to convert from Dwight's codes to the Acquirer's codes.

F. Respondents are not required to provide Acquirer (a) any latitude or longitude data that respondents possess solely by reason of the Data Exchange and Sales Representative Agreement entered into between Dwight's and TDG on June 1, 1995; (b) any software, or any rights to use or sublicense any software; or (c) any calculation of estimated future recoverable oil or gas reserves.

G. Respondents are not required to provide Acquirer the right to use the record layouts specified in paragraph IV.A when sublicensing the specified data.

H. The Acquirer shall not transfer or sublicense any rights to any specified data in any manner that would have the effect of creating additional independent vendors for the whole or any part of the specified data. Notwithstanding the above, Acquirer shall have the right to, among other things: assign or otherwise transfer all of its rights to and interest in all or part of the specified data to another person; create distributorships or appoint sales agents for licensing of the specified data; or license the specified data to geological libraries for use by their members on a read-and-print-only basis. In addition, Acquirer shall have the right to enter into data exchange agreements wherein the recipient of the Acquirer's data has the right to market and sublicense the specified data, provided that the recipient under such data exchange agreement shall not grant a license or other right

to specified data, or otherwise knowingly make the specified data available, to any person unless such person has agreed not to transfer or sublicense the specified data and not to make the specified data publicly available. Respondents shall not enforce any restriction on the Acquirer's right to transfer or sublicense the specified data in the event that a court or an administrative agency, in a proceeding involving the respondents, issues a final order from which no appeal has been or can be taken, determining that all or a portion of the specified data is not protected intellectual property. Within 30 days of the issuance of such an order, respondents shall notify the Commission and the Acquirer that restrictions on the transfer or sublicense contained in the License Agreement will not be enforced with respect to the portion of the specified data that was determined to be unprotected intellectual property.

I. Upon reasonable notice to respondents from the Acquirer, respondents shall provide such assistance to the Acquirer as is reasonably necessary to ensure that the purpose of the divestiture of the specified data is accomplished. Such assistance shall include reasonable consultation with knowledgeable employees of respondents for a period of time sufficient to ensure that the Acquirer's personnel are appropriately trained in the sources and processing of the data contained in the specified data. Respondents, however, shall not be required to continue providing such assistance for more than twelve (12) months from the date of the divestiture. Respondents may charge the Acquirer at a rate no greater than their direct costs for providing such technical assistance. Direct costs consist of expenses and the salary and benefits attributable to respondents' employees actually providing assistance, for the time required for the provision of such technical assistance, and variable overhead, including out-of-pocket expenses.

J. Respondents may take reasonable steps with respect to their employees to assure that the confidentiality of their proprietary data is not compromised, but respondents shall not impose non-competition agreements that have the purpose or effect of interfering with the ability of the Acquirer to recruit or employ respondents' employees.

K. Respondents, upon 24 hours advance notice by the Acquirer, shall provide Acquirer, at Acquirer's expense, reasonable access to, and the right to copy, any data-source document or data in respondents' possession that was used to compile the specified data to the extent respondents have such data-source document or data at

the time of the request. Respondents may charge the Acquirer only for respondents' direct costs in providing such access or copying. Direct costs consist of the salary and benefits attributable to respondents' employees for the time required for the provision of such access and copying, and variable overhead, including out-of-pocket expenses.

L. Within ten (10) days after divestiture of the specified data, Dwight's shall assign to the Acquirer all of its rights under and interest in the Data Exchange Agreement of July 1, 1993, with The Independent Oil & Gas Service, Inc. ("Independent"), which relates to well data in Kansas. If Independent consents to such assignment, Petroleum Information/Dwight's shall promptly remove from its products all data acquired from Independent under the Data Exchange Agreement of July 1, 1993, and all predecessor agreements and provide the data to the Acquirer in the record layout specified in paragraph IV.A above; provided, however, that Petroleum Information/Dwight's shall be free to negotiate a new agreement with Independent. Such new agreement may neither be exclusive nor contain a royalty-based compensation provision. If Independent does not consent to such assignment, Dwight's shall promptly terminate the Data Exchange Agreement in accordance with its terms and provide any data to which Dwight's has an ownership right under said Agreement to the Acquirer in the record layout specified in paragraph IV.A.

M. Within ten (10) days after divestiture of the specified data, Dwight's shall assign to the Acquirer all of its rights under and interest in the Joint Marketing Agreement of July 1, 1994, with Munger Oil Information Services, Inc. ("Munger"), which relates to well data for California, Oregon, Pacific Federal Offshore, Alaska, and Washington. If Munger consents to such assignment, Petroleum Information/Dwight's shall promptly remove from its products all data acquired from Munger under the Joint Marketing Agreement of July 1, 1994, and all predecessor agreements and provide the data to the Acquirer in the format specified in paragraph IV.A above; provided, however, that Petroleum Information/Dwight's shall be free to negotiate a new agreement with Munger. Such new agreement may neither be exclusive nor contain a Royalty-based compensation provision. If Munger does not consent to such assignment, Dwight's shall promptly terminate the Joint Marketing Agreement in accordance with its terms and provide any data to which Dwight's has

an ownership right under said Agreement to the Acquirer in the record layout specified in paragraph IV.A.

V.

*It is further ordered*, That respondents shall provide to the Commission staff or a Repository designated by the Commission staff a copy of the specified data that was provided to the Acquirer, a copy of all Schedule A products as of the date on which the Commission accepts this order for comment, and a copy of all Dwight's CD-ROM products published and offered for sale to customers immediately prior to the divestiture of the specified data.

VI.

*It is further ordered*, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without prior notification to the Commission, directly or indirectly:

A. Acquire any stock, share capital, equity, or other interest in Graphics Information Technologies, Inc., or in any person engaged in the distribution of a relevant product at any time within the two years preceding such acquisition;

B. Enter into any agreements or other arrangements with any person whose principal business is distributing a relevant product, to obtain direct or indirect ownership, management, or control of any preexisting data bases that are or were used in such business; or

C. Acquire from any one entity cumulatively during any period of three consecutive calendar years (a) the exclusive ownership of records containing well data covering more than 75,000 wells in any one state except Texas, or 250,000 wells in the State of Texas or (b) either the exclusive right, or a non-exclusive right with a royalty-based compensation, to market well data covering more than 75,000 wells in any one state except Texas, or 250,000 wells in the State of Texas. Respondents shall have the right to rely upon the supplying entity's best estimates, at the time of the acquisition, concerning the number and locations of the covered wells. In determining whether notification may be required by this provision, well records that have been included in a previous notification under this provision or under 15 U.S.C. 18a shall not be considered.

VII.

*It is further ordered*, That the prior notifications required by paragraph VI of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by paragraph VI of this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VIII.

*It is further ordered*, That within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II, III, IV, and V of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, or have complied with this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the order.

IX.

*It is further ordered*, That:

A. Within ten days of receiving notification from the Commission staff that the specified data has been divested to the Acquirer, TDG shall offer to the Acquirer, its successor, assignee, agent or distributor (collectively, "Acquirer" for purposes of this paragraph), a Sales Representative Agreement in the form of Exhibit C hereto. The terms of any sales representative agreement between TDG and the Acquirer shall cover the same products and be at least as favorable to the Acquirer as the terms agreed to from time to time between TDG and Petroleum Information/Dwight's. The Sales Representative Agreement for the Acquirer shall be non-terminable by TDG, except under the following circumstances:

1. The breach of material terms by the Acquirer or the Acquirer's inability to pay. In the case of such a breach, the obligations of TDG shall resume upon cure of the breach. In the case of receivership or voluntary or involuntary bankruptcy, or the institution of proceedings therefor, the obligation of TDG under this paragraph may be suspended until the appointment of a trustee or a successor to operate the Acquirer's business or a debtor in possession; or

2. TDG no longer maintains a Sales Representative Agreement with Petroleum Information/Dwight's and there are no other joint selling arrangements between TDG and Petroleum Information/Dwight's for a particular product.

B. TDG shall not disclose to any officer, director, or employee of Petroleum Information/Dwight's or any shared employee any information that TDG receives from the Acquirer regarding (1) the Acquirer's actual or prospective customers, (2) the content of any customer proposals or offers made by the Acquirer, or (3) the terms of any individual customer dealings with TDG or the Acquirer.

C. Within 30 days of receiving notification from the Commission staff that the specified data has been divested to the Acquirer, TDG shall submit to the Commission a copy of the Sales Representative Agreement entered into with Petroleum Information/Dwight's and with the Acquirer. For three years after the date this order becomes final, TDG shall submit to the Commission any revisions or amendments to such agreements within thirty (30) days of their execution.

X.

*It is further ordered*, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and reasonable notice, each respondent and TDG shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to the appropriate respondent, and without restraint or interference, to interview officers, directors, or employees of the respondent, who may have counsel present.

XI.

*It is further ordered*, That respondents and TDG shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents or TDG such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporations that may affect compliance obligations arising out of the order.

SCHEDULE A

I. Dwight's Production Data CD-Rom Products

West Coast Area, consisting of California, Oregon, Pacific Federal Offshore, Alaska

Gulf Coast Area, consisting of Arkansas, Louisiana, Mississippi, Alabama, Florida, Federal Offshore, Coastal Counties of Texas

MidContinent Area, consisting of Arkansas, Kansas, Michigan, Oklahoma and Texas Railroad Commission District 10.

Texas Area, consisting of all of Texas

Rocky Mountain Area, consisting of Arizona, Colorado, Montana, New Mexico, North Dakota, South Dakota, Wyoming, Nebraska, Nevada, Utah

II. Dwight's Discover SCOUT CD-ROM Products

Gulf Coast Area, consisting of Arkansas, Louisiana, Mississippi, Alabama, Florida, Federal Offshore

MidContinent Area, consisting of Northern Arkansas, Michigan, Oklahoma and Texas Railroad Commission District 10

Texas Area, consisting of all of Texas

Rocky Mountain Area, consisting of Arizona, Colorado, Montana, New Mexico, North Dakota, South Dakota, Wyoming, Nebraska, Nevada, Utah, Idaho

III. Dwight's Discover CD-ROM Products

Oklahoma Area, consisting of Oklahoma

Rocky Mountain Area, consisting of Arizona, Colorado, Montana, New Mexico, North Dakota, South Dakota, Wyoming, Nebraska, Nevada, Utah, Idaho

IV. Dwight's Petroleum Reservoirs (DPR) With Operated Production CD-ROM Products

State of Alaska

State of California

Permian Basin

Texas & Southeast New Mexico

State of Oregon

Gulf Coast Area, consisting of Alabama, Arkansas, Florida, Gulf of Mexico Offshore, Louisiana, Mississippi, Texas Railroad Commission Districts 2, 3, and 4

MidContinent Area, consisting of Arkansas, Kansas, Oklahoma, Texas Railroad Commission District 10

Rocky Mountain Area, consisting of Arizona, Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming, New Mexico

# ANNEX 1

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## Record Layout for Comma Delimited File

The option to export WDS information in a comma delimited format provides additional flexibility for importing data into spreadsheet and database management programs.

Each field within a record is separated by commas. Fields are not alpha or Zero filled. Alpha fields are surrounded by double quotes; any field without quotes is read as numeric.

READER & LOCATION INFORMATION
FILE NAME: *.EDR

| Item Name | Format | Maximum Length | Length With Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 10) | N | 2 | 3 |
| FULL API NUMBER | A | 10 | 13 |
| API STATE CODE | A | 2 | 6 |
| API COUNTY CODE | A | 3 | 6 |
| API WELL CODE | A | 5 | 8 |
| MERIDIAN CODE | A | 2 | 5 |
| SECTION | N | 2 | 4 |
| TOWNSHIP | N (3,1) | 3 | 6 |
| TOWNSHIP DIRECTION | A | 1 | 4 |
| RANGE | N (3,1) | 3 | 6 |
| RANGE DIRECTION | A | 1 | 4 |
| QUARTER QUARTER | A | 12 | 15 |
| FOOTAGE NORTH/SOUTH | N | 5 | 6 |
| FOOTAGE DIRECTION NORTH/SOUTH | A | 1 | 4 |
| FOOTAGE EAST/WEST | N | 5 | 6 |
| FOOTAGE DIRECTION EAST/WEST | A | 1 | 4 |
| FOOTAGE CORNER | A | 2 | 5 |
| FOOTAGE QUADRANT | A | 2 | 5 |
| OPERATOR CODE | N | 6 | 7 |
| OPERATOR | A | 40 | 43 |
| LEASE NAME | A | 32 | 35 |
| WELL NUMBER | A | 6 | 9 |
| ELEVATION | N | 5 | 6 |
| ELEVATION TYPE | A | 2 | 5 |
| FIELD NAME | A | 30 | 33 |
| FIELD CODE | N | 9 | 10 |
| RESERVOIR | A | 24 | 27 |
| OBJECTIVE DEPTH - MEASURED | N | 5 | 6 |
| * OBJECTIVE DEPTH - TVD | N | 5 | 6 |
| OBJECTIVE FORMATION | A | 24 | 27 |
| OBJECTIVE FORMATION AGE CODE | N | 3 | 4 |
| WELL TYPE | A | 2 | 5 |
| COMPLETION TYPE | A | 2 | 5 |
| OLDEST FORMATION REPORTED | A | 24 | 27 |
| OLDEST FORMATION AGE CODE | N | 3 | 4 |
| FILE STATUS FLAG | A | 1 | 4 |
| CURRENT STATUS | A | 5 | 8 |
| ENTRY DATE (yyyymmdd) | N | 8 | 9 |
| CHANGE DATE (yyyymmdd) | N | 8 | 9 |
| PERMIT DATE (yyyymmdd) | N | 8 | 9 |
| PERMIT NUMBER | A | 8 | 11 |
| OFFSHORE FLAG | A | 1 | 4 |

* Record Layout detailed for future implementation of data item, currently not populated.

# ANNEX 1

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LATITUDE & LONGITUDE
FILE NAME: *.LL

| Item Name | Format | Maximum Length | Length With Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (const. asst value: 10) | N | 2 | 3 |
| LAT-LONG SOURCE | A | 6 | 9 |
| LATITUDE | N (3,6) | 10 | 11 |
| LONGITUDE | N (3,6) | 10 | 10 |

PERMIT & COMPLETION DATA
FILE NAME: *.CMP

| Item Name | Form Length | Maximum Delimiters | Length with |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 20) | A | 2 | 3 |
| SPUD DATE (yyyymmdd) | N | 8 | 9 |
| CONTRACTOR | A | 24 | 27 |
| RIG NUMBER | A | 16 | 19 |
| CIRCULATION MEDIUM | A | 1 | 4 |
| TOTAL DEPTH - MEASURED | N | 5 | 6 |
| * TOTAL DEPTH - TVD | N | 5 | 6 |
| TOTAL DEPTH DATE (yyyymmdd) | N | 8 | 9 |
| FORMATION AT TOTAL DEPTH | A | 24 | 27 |
| FORMATION AT TD AGE CODE | N | 3 | 4 |
| PLUGBACK DEPTH | N | 5 | 6 |
| COMPLETION DATE (yyyymmdd) | N | 8 | 9 |
| COMPLETION CODE | A | 2 | 5 |
| FINAL STATUS | A | 5 | 8 |
| PRODUCING LEASE NUMBER | N | 7 | 8 |
| PRODUCING WELL NUMBER | N | 7 | 8 |
| LOCATION REPORT DATE (yyyymmdd) | N | 8 | 9 |
| COMPLETION REPORT DATE (yyyymmdd) | N | 8 | 9 |
| * DATA SOURCE | A | 6 | 9 |
| * DATA SOURCE WELL ID | A | 24 | 28 |

* Record layout designed for future implementation of data item; currently not populated.

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TOPS RECORDS
FILE NAME: *.TOP

| Item Name | Form | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 30) | N | 2 | 3 |
| TOP SOURCE | A | 1 | 4 |
| FORMATION TOP TYPE | A | 1 | 4 |
| FORMATION DEPTH | N | 8 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | N | 2 | 3 |

ALL NAMED FILES
FILE NAME: *.TIF

| Item Name | Form | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD FORMAT | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 8 | 6 |
| RECORD SUB-SEQUENCE NUMBER | N | 3 | 4 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE | N | 2 | 3 |
| INFORMATION TYPE | A | 8 | 11 |
| ** NARRATIVE INFORMATION | A | | |

PARSED CORE DATA
FILE NAME: *.COR

| Item Name | Form | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 8 | 6 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value: 8) | N | 1 | 2 |
| INFORMATION TYPE (constant value: core) | A | 4 | 7 |
| TEST NUMBER | N | 3 | 4 |
| INTERVAL TOP | N | 8 | 6 |
| INTERVAL BOTTOM | N | 8 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | N | 2 | 3 |
| REMARKS | A | 27 | 30 |
| ** CORE NARRATIVE | A | | |

** Length of narrative is variable

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PARSED DST DATA
FILE NAME: *.DST

| Item Name | Data Type | Max. Item Length | Length with Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| RECORD SUB-SEQUENCE NUMBER | N | 3 | 4 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value: 10) | N | 2 | 3 |
| INFORMATION TYPE (constant value: DST) | A | 3 | 6 |
| TEST NUMBER | N | 3 | 4 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | N | 3 | 4 |
| STATUS REMARKS | A | 8 | 11 |
| FIRST TIME OPEN | N | 3 | 4 |
| FIRST TIME SHUT IN | N | 3 | 4 |
| SECOND TIME OPEN | N | 3 | 4 |
| SECOND TIME SHUT IN | N | 3 | 4 |
| INITIAL HYDROSTATIC PRESSURE | N | 5 | 6 |
| FINAL HYDROSTATIC PRESSURE | N | 5 | 6 |
| FIRST INITIAL FLOW PRESSURE | N | 5 | 6 |
| FINAL INITIAL FLOW PRESSURE | N | 5 | 6 |
| SECOND FLOW PRESSURE | N | 5 | 6 |
| SECOND FINAL FLOW PRESSURE | N | 5 | 6 |
| FIRST SHUT-IN PRESSURE | N | 5 | 6 |
| SECOND SHUT-IN PRESSURE | N | 5 | 6 |
| BOTTOM HOLE TEMPERATURE | N | 6 | 7 |
| RESISTIVITY | N | 5 | 6 |
| RECOVERY 1 VALUE | A | 33 | 36 |
| RECOVERY 1 DESCRIPTION | N | 5 | 6 |
| RECOVERY 2 VALUE | A | 33 | 36 |
| RECOVERY 2 DESCRIPTION | N | 5 | 6 |
| RECOVERY 3 VALUE | A | 33 | 36 |
| RECOVERY 3 DESCRIPTION | N | 5 | 6 |
| RECOVERY 4 VALUE | A | 33 | 36 |
| RECOVERY 4 DESCRIPTION | | | |
| ** SAMPLE NARRATIVE | N | | |

** Length of narrative is variable.

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PARSED SHOWS
FILE NAME: *.SBO

| Data Name | Type | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WCR ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value 12) | N | 2 | 3 |
| INFORMATION TYPE (constant value: Shows) | A | 5 | 8 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | A | 4 | 4 |
| REMARKS | A | 27 | 30 |
| ** SHOW NARRATIVE | A | | |

PARSED PERFS
FILE NAME: *.PER

| Data Name | Type | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WCR ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value: 21) | N | 2 | 3 |
| INFORMATION TYPE (constant value: Perfs) | A | 5 | 8 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | A | 4 | 4 |
| REMARKS | A | 27 | 30 |
| ** PERF NARRATIVE | A | | |

PARSED PICKS
FILE NAME: *.PIC

| Data Name | Type | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WCR ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value: 23) | N | 2 | 3 |
| INFORMATION TYPE (constant value: PLone) | A | 5 | 8 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | A | 4 | 4 |
| REMARKS | A | 27 | 30 |
| ** PAY ZONE NARRATIVE | A | | |

** Length of narrative is maximum.

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INITIAL POTENTIAL
FILE NAME: *.IP

| Item Name | Form | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value: 20) | N | 2 | 3 |
| INFORMATION TYPE (constant value: IP) | A | 2 | 5 |
| VOLUME, OIL | N | 5 | 6 |
| UNITS OIL VOLUME | A | 7 | 10 |
| VOLUME, GAS | N | 5 | 6 |
| UNITS GAS VOLUME | A | 7 | 10 |
| VOLUME, WATER | N | 5 | 6 |
| UNITS WATER VOLUME | A | 7 | 9 |
| ** IP NARRATIVE | A | | |

COMBINED PERF, PECNE, AND IP RECORD
FILE NAME: *.PPI
(Available in June 1981 Release)

| Item Name | Form | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value: 21) | N | 2 | 3 |
| INFORMATION TYPE (constant value: Perfs/Pecne) | A | 5 | 8 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | N | 2 | 3 |
| CHOKE SIZE | A | 5 | 8 |
| FLOW TUBING PRESSURE | N | 5 | 6 |
| FLOW CASING PRESSURE | N | 5 | 6 |
| SHUT IN TUBING PRESSURE | N | 5 | 6 |
| SHUT IN CASING PRESSURE | N | 5 | 6 |
| GRAVITY | N (3,1) | 5 | 6 |
| OIL VOLUME | N | 5 | 6 |
| OIL UNITS | A | 7 | 10 |
| GAS VOLUME | N | 5 | 6 |
| GAS UNITS | A | 7 | 10 |
| WATER VOLUME | N | 5 | 6 |
| WATER UNITS | A | 7 | 10 |
| METHOD OF TEST | A | 3 | 6 |
| CALCULATED FLAG | A | 1 | 4 |
| OCR | N | 10 | 11 |
| REMARKS | A | 27 | 30 |
| ** PERF NARRATIVE | A | | |

** Length of narrative is location

# ANNEX 1

Well Data
Annex 1
Page 7 of 7

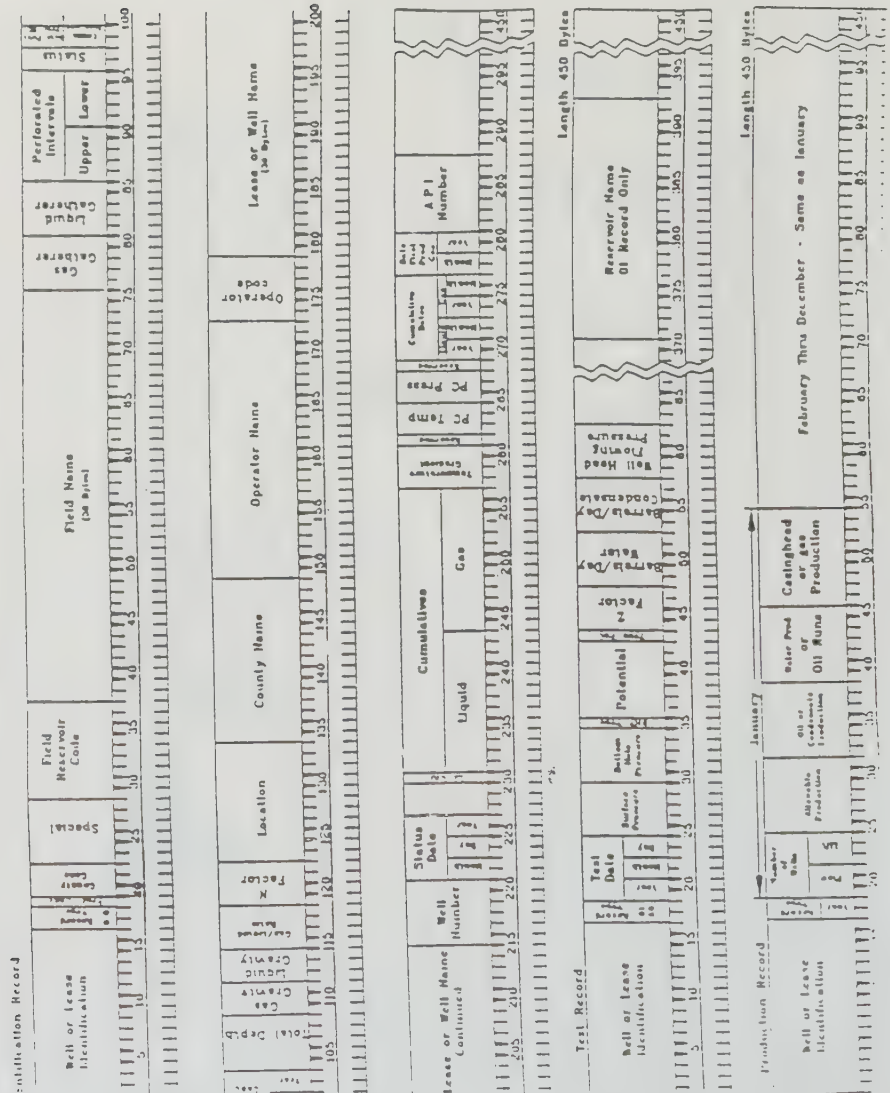
OPERATOR & NAMES LOOKUP TABLES
FILE NAME: *.LUT

| Data Items | Data Type | Maximum Length | Length with Decimals |
|---|---|---|---|
| WCR ID | A | 8 | 11 |
| RECORD TYPE (constant value: 90) | N | 2 | 3 |
| DWIGHTS OPERATOR CODE | N | 6 | 7 |
| OPERATOR ADDRESS | A | 64 | 67 |
| API STATE CODE | N | 2 | 5 |
| POSTAL ABBREV | A | 2 | 5 |
| STATE NAME | A | 20 | 23 |
| API COUNT CODE | N | 3 | 6 |
| COUNTY NAME | A | 20 | 23 |
| * DWIGHTS DISTRICT CODE | N | 3 | 4 |
| DISTRICT NAME | A | 28 | 31 |
| AAPG BASIN CODE | N | 3 | 4 |
| AAPG BASIN NAME | A | 28 | 31 |
| COUNTRY CODE | A | 4 | 7 |
| COUNTRY NAME | A | 20 | 23 |

* Record layout designed for future implementation of data item; currently not populated.

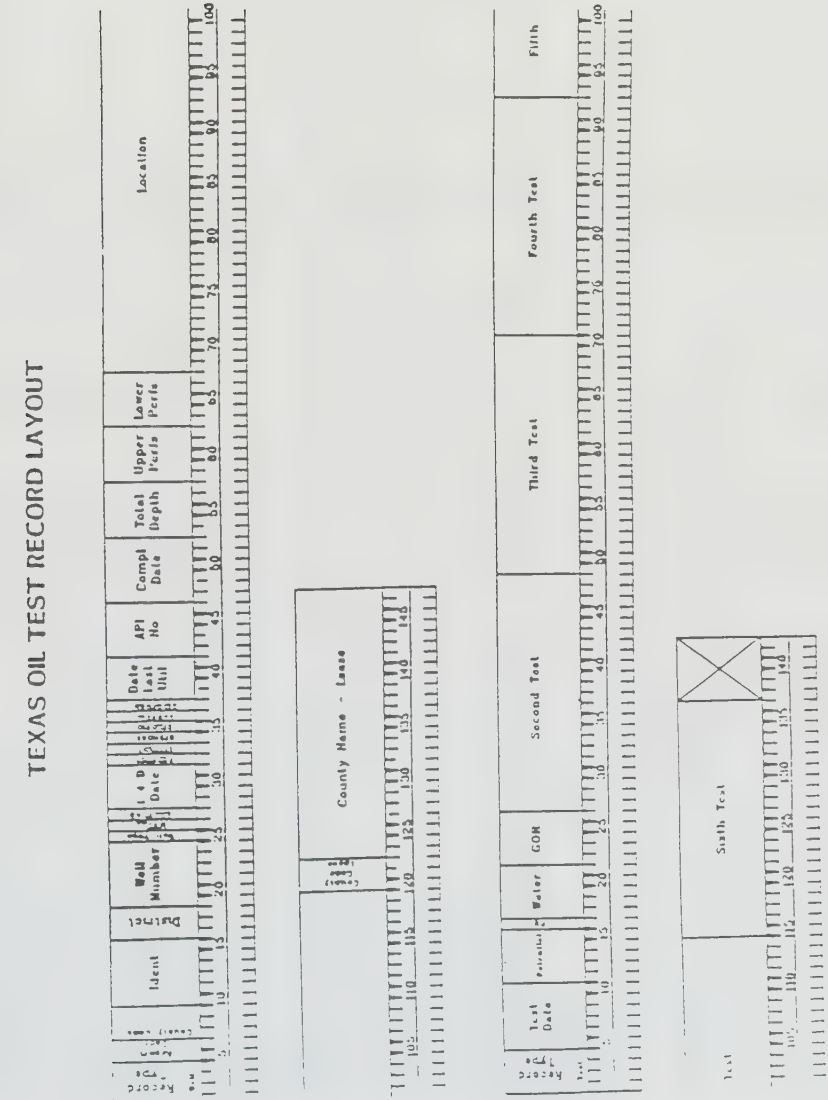
## ANNEX 2

Production Data
Annex 2 A
Page 1 of 3

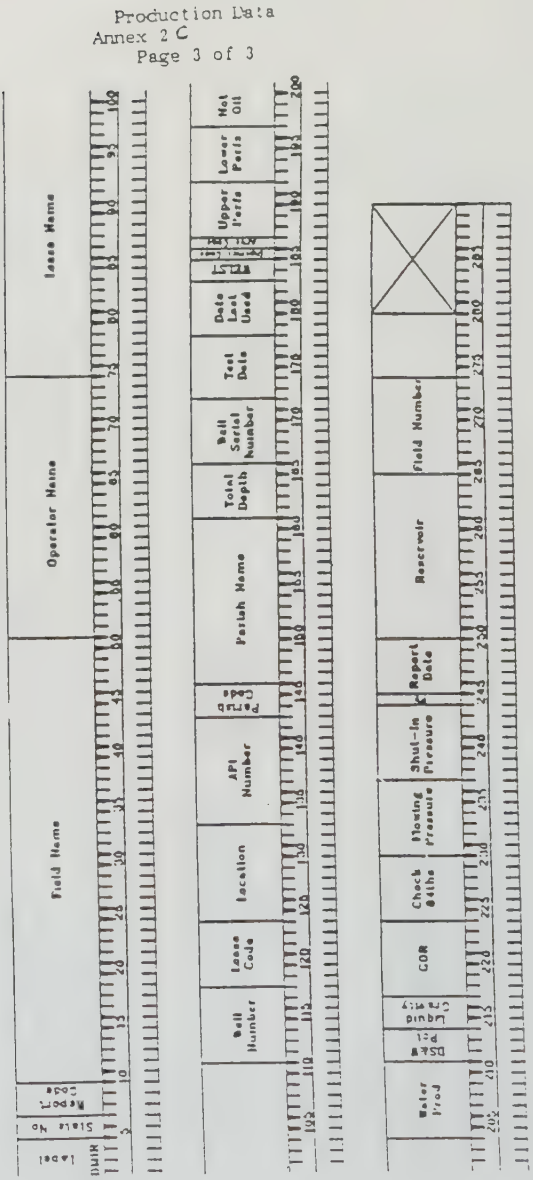


# ANNEX 2

Production Data
Annex 2 B
Page 2 of 3



ANNEX 2


Production Data
Annex 2 C
Page 3 of 3
LOUISIANA OIL TEST RECORD LAYOUT
Label
Record Code
State No.
Field Name
Operator Name
Lease Name
Well Number
Lease Code
Location
API Number
Parish Name
Total Depth
Well Serial Number
Test Date
Date Last Used
Upper Perfs
Lower Perfs
Net Oil
Water Prod
GOR
Check &the
Flowing Pressure
Shut-in Pressure
Report Date
Reservoir
Field Number

ANNEX 3

DWIGHT'S

PETROLEUM DATA SYSTEM

TOTL FORMAT

DPDS/TOTL Fixed-Format Specification

Tape Structure
A DPDS/TOTL Fixed-Format data tape contains data from the Dwight's Petroleum Data System Oil and Gas file (TOTL) database. There are three versions of the DPDS/TOTL Fixed-Format file:

The Initial Load format will contain all information about each Field or Reservoir.

The Update format will contain only information that has been updated since the previous release.

The Special format will contain all information about each Field or Reservoir in a custom-defined area.

There are multiple physical files per tape. Each tape begins with a Tape Header File. This file contains one record, a Tape Header Record (Record type 0000), which identifies the information present on the tape. The remaining files are divided into TOTL Area Groups. Each TOTL Area Group has:

File Header File. This file contains one record, a File Header Record (Record Type 0001), which identifies the DPDS Area to which the data file applies.

Data File. This file contains the actual DPDS/TOTL data. Refer to the attached tape specifications for the format of the data file. The last record in the Data File will always be a File Total Record (Record Type 9900). The File Total Record contains control totals which can be used to verify that the update completed successfully.

The last file on the tape is a Tape Total File. This file contains one record, a Tape Total Record (Record Type 9999), which contains control totals which can be used to verify that the update completed successfully.
Each file on the DPDS/TOTL Fixed-Format tape has a record length of 140. The records are blocked at 114 records per block for a blocksize of 15,960.
Tapes can be produced using either the EBCDIC or ASCII character set.
Tapes can be produced at a density of 1600 or 6250 bpi.
Dwight's uses industry-standard 2400 feet, 9-track tapes.

Record Type Relationships
Each record contains a Unique Record identifier and a Transaction Code. The Unique Record Identifier (UNIQID) will specifically identify one, and only one, field or reservoir record in DPDS/TOTL. The Transaction Code indicates the action to be taken to update the data associated with the TOTL field or reservoir record. There are three Transaction Types:

The Add Transaction Type (A) indicates that the data on the transaction record did not previously exist and should be added to the file. An Initial Load tape will consist of only Add transactions. If an Add transaction is encountered on Record Type 0100, this indicates a new field or reservoir to be added to the file. An Add transaction on other record types indicates that the data on that transaction record should be added to the field or reservoir record identified by the Unique Record Identifier.

The Change Transaction Type (C) indicates that one or more data items on the transaction record has been updated. All data items on the TOTL field or reservoir record should be updated with the values provided on the Change transaction.

The Delete Transaction Type (D) indicates that all data items on the transaction record have been deleted from the DPDS/TOTL file. If a Delete transaction is encountered on Record Type 0100, this indicates that the entire field or reservoir record has been deleted from the DPDS/TOTL file. A Delete transaction on other record types indicates that only those data items on that transaction have been deleted from the field or reservoir record.

Data Types

There are three data types used by the DPDS/TOTL Fixed-Format Specification. The Data Type is indicated by an A, N, or L in the "Type" column of the Fixed-Format Specification that follows. The three data types are:

The Alpha-Numeric data type (A) indicates text data and can contain letters, numbers, and special characters. Alpha-numerica data is left-justified.

The Numeric data type (N) contains a numerica value only. The numbers are FORTRAN-compatible. The numbers do not contain leading zeros, and have an explicit decimal point if not a whole number. A numerica specification is provided in the "Format" column. The numeric specification is given in the format "W.D", where "W" is the total field width, and "D" is the number of decimal digits.

The Logical data type (L) contains either a "1" or a blank. The "1" indicates a "TRUE" condition, and the blank indicates a "FALSE" condition.

## EXHIBIT A

## LICENSE AGREEMENT FOR SPECIFIED DATA

This Agreement is made by and between Dwight's Energydata, Inc., a Delaware corporation, located at 1633 Firman Drive, Richardson, Texas 75081 (hereinafter referred to as "Dwight's"), and HPDI, L.L.C., located at 9300 Research Boulevard, Suite 306, Austin, Texas (hereinafter referred to as "Licensee"). This Agreement replaces and supersedes an Agreement between the parties signed as of May 2, 1996, which earlier Agreement shall be null and void.

### 1. LICENSE AND DATA

(a) Dwight's hereby grants to Licensee, subject to the terms and provisions of this Agreement, a perpetual, worldwide, nonexclusive license (the "License") to use, combine with other information, reproduce and market, with the rights provided herein to sublicense, assign or otherwise transfer, the digital well data and the digital production data described on Schedule A hereto (collectively the

"Specified Data"). The License shall become effective on the Effective Date (as hereinafter defined) upon the payment by License of the initial installment of the License Fee (as hereinafter defined) in accordance with paragraph 3 hereof.

(b) Dwight's shall deliver the Specified Data to Licensee in machine-readable form in the record layout in Annex 1 to Schedule A hereto (for well data), in the record layouts in Annexes 2A, 2B and 2C to Schedule A hereto for production data, the Texas oil test (W10) file and the Louisiana oil test (DM1R) file) and in the record layout in Annex 3 to Schedule A hereto (for Petroleum Data System (PDS) data). The Specified Data so delivered shall be in the computer language in which Dwight's records therefor are maintained or, if requested in writing by the Licensee at least ten days prior to the Effective Date, in industry standard (8-bit) ASCII, or in any other mutually agreeable format. Delivery of the Specified Data shall be in accordance with the following schedule:

(i) A copy of the well data portion of the Specified Data, current as of each date of delivery, shall be delivered (A) in a single delivery within ten days after the Effective Date [ ].

(ii) A copy of the production data portion of the Specified Data for the states of Texas, Louisiana, Oklahoma, New Mexico, Kansas and Colorado and for Guld Offshore (the "HPDI Areas"), current as of each date of delivery, shall be delivered (A) in a single delivery within ten days after the Effective Date [ ].

(iii) A copy of the production data portion of the Specified Data for all areas other than the HPDI Areas (the "Non-HPDI Areas"), current as of each date of delivery, shall be delivered (A) in a single delivery within ten days after the Effective Date [ ].

(iv) A copy of the PDS data portion of the Specified Data, current as of each date of delivery, shall be delivered (A) in a single delivery within ten days after the Effective Date [ ].

The Specified Data so delivered shall be accompanied by well identifier codes, field and reservoir codes and operator codes created by Dwight's for use by Licensee to the same extent as Dwight's has created such codes for its own use.

(c) Each portion of the Specified Data shall be current as of the date of its delivery for all data elements included in the products listed on Schedule A hereto that are part of the delivery. Dwight's shall have no obligation to provide updates with respect to Specified Data after the date of delivery thereof [ ].

(d) Notwithstanding the foregoing, and subject to paragraph 1(f) hereof, Licensee shall have no right to market, sublicense, assign or otherwise transfer the record layouts and formats set forth in Annexes 1, 2A, 2B, 2C or 3 to Schedule A hereto, any proprietary well identifier codes, field and reservoir codes or operator codes of Dwight's or any other proprietary formats of Dwight's. In no event shall Licensee acquire any right under this Agreement to (i) any latitude or longitude data that Dwight's possesses solely by reason of the Data Exchange and Sales Representative Agreement, dated June 1, 1995, with Tobin Data Graphics LLC ("TDG"), (ii) any software (or any intellectual property or other rights in respect thereof) or (iii) any calculation of estimated future recoverable oil and gas reserves. Without limiting the foregoing, it is acknowledged that the Agreement Containing Consent Order (In the Matter of SoftSearch Holdings, Inc., and GeoQuest International Holdings, Inc., File No. 951-0130) in the form executed by Dwight's for acceptance by the Federal Trade Commission (the "Order"), contemplates that

Licensee shall be offered a Sales Representative Agreement by TDG covering the same products and on as favorable terms as those agreed to from time to time between TDG and Petroleum Information/Dwight's (as hereinafter defined).

(e) At the time of delivery of each portion of the Specified Data. Dwight's shall provide Licensee for its own use a copy of all technical system documentation and user documentation relating to such Specified Data then in existence. With respect to the Specified Data as a whole, such documentation shall include, but is not limited to, a description of all data elements in Dwight's Well Data System, a description of the data file in Dwight's A-File (unpacked) file; a description of the test file in the Texas oil test (W10) file; a description of the test file in the Louisiana oil test (DM1R) file; Dwight's "Data Item Manual" and the keys to all codes created by Dwight's for use by Licensee pursuant to paragraph 1(b) above.

(f) On the Effective Date, Dwight's shall provide Licensee, in machine-readable form as described in paragraph 1(b) above, with a cross-reference to enable License and its Sublicensees to convert from Dwight's proprietary codes to non-proprietary codes.

2. LICENSE TERM

(a) This Agreement shall become effective on the latest of (i) the date the assets of Dwight's are transferred to Petroleum Information/Dwight's, L.L.C. ("Petroleum Information/Dwight's") pursuant to the Formation Agreement to be entered into by Dwight's and GeoQuest International Holdings, Inc., or (ii) the date the order becomes final; or (iii) the date the Federal Trade Commission approves divestiture to HPDI. L.L.C. pursuant to the order," (the latest such date being herein referred to as the "Effective Date"), and shall remain in effect unless and until it is terminated in accordance with the terms hereof or applicable law. Dwight's shall have no obligation to Licensee to effect such transfer or obtain such issuance or approval, any of which may be abandoned at any time for any reason or no reason. Nothing contained in the immediately preceding sentence is intended to, or shall, permit Dwight's to license the Specified Data to a higher bidder pursuant to the order while Licensee is ready, willing and able to perform its obligations under this Agreement, if such transfer occurs and the Federal Trade Commission continues to require the License as contemplated by the order.

(b) Dwight's shall have no right, whether at common law, in equity, or in bankruptcy or reorganization (including through obtaining any equity interest in a reorganized Debtor) or otherwise, to terminate the License or to seek to have the License terminated, or to require, or seek to require, the Licensee to return the Specified Data.

(c) Licensee may terminate the License only by assignment as provided in paragraph 6, herein.

3. LICENSE FEE

(a) Licensee shall pay to Dwight's the sum of $[ ] for the license granted hereunder (the "License Fee") in accordance with the following schedule: [ ]. The amount of the License Fee remaining unpaid from time to time shall bear interest at the rate of [ ]% per annum, compounded monthly, payable annually on each anniversary of the Effective Date and on the date on which such amount matures, whether by acceleration or otherwise. Such amount shall be evidenced by a

negotiable promissory note of Licensee, payable to the order of Dwight's, in form and substance reasonably satisfactory to Dwight's, which shall be delivered by Licensee to Dwight's on the Effective Date.

(b) Licensee shall be responsible for and shall pay all sales, use, transfer or other taxes, however designated, levied or based on the License Fee, the License or any other rights granted under this Agreement, exclusive of taxes based on the overall income or capital of Dwight's.

4. PROPERTY RIGHTS: CONFIDENTIALITY

(a) No title to or ownership interest in any of the Specified Data or any other information provided pursuant to this Agreement is transferred to Licensee hereby. The Specified Data and all such other information, regardless of the form, format, and media in which they are contained, are and remain the exclusive property and trade secrets of Dwight's notwithstanding the license granted hereby. Dwight's retains all copyright interests in the Specified Data, whether published or unpublished, all trade secrets and all other intellectual or proprietary rights in the Specified Data and other information provided pursuant to this Agreement.

(b) Licensee hereby acknowledges that the Specified Data and other information provided pursuant to this Agreement contain trade secrets and other proprietary information of Dwight's.

(c) Licensee shall keep the Specified Data and such other information received from Dwight's under this License confidential in accordance with this Agreement. Licensee shall take all steps necessary or reasonably requested by Dwight's to assure that it, its sublicensees and others to whom Licensee may from time to time make the Specified Data available in accordance with this Agreement shall avoid unauthorized publication, use or disclosure of the Specified Data, and otherwise shall not permit the Specified Data to become publicly available.

(d) Licensee shall have no right to use the name "Dwight's" or "PI" or "Petroleum Information" (or any variations thereof) or any trademarks or service marks of Dwight's or Petroleum Information's in any manner, and Licensee shall not use the name "Dwight's" or "PI" or "Petroleum Information" (or any variations thereof) or any trademarks or service marks of Dwight's or Petroleum Information's in describing, marketing, using or sublicensing the Specified Data, or in any other manner. The foregoing is not intended to prohibit Licensee from (i) inserting announcements in the trade press, for a period not to exceed six months from the Effective Date, that on [date] Licensee acquired the Specified Data from Dwight's Energydata as a result of a consent order issued by the Federal Trade Commission relating to the merger of Dwight's and Petroleum Information Corporation or (ii) responding orally and in good faith, but not as part of any marketing effort, to inquiries concerning the source of the Specified Data.

5. UPDATES AND SUPPORT

Dwight's shall not be obligated to update or support any of the Specified Data after the Effective Date, except for [ ] the technical assistance provided pursuant to paragraph 9 hereof.

6. SUBLICENSES, ASSIGNMENTS AND OTHER TRANSFERS

Licensee shall not sublicense, assign or otherwise transfer any rights to any Specified Data in any manner that would have the effect of creating one or more vendors for the while or any part of Specified Data in addition to Licensee. Notwithstanding the foregoing. Licensee shall have the right to do the following:

(a) Sublicense all or part of the Specified Data without (i) the right to further sublicense, or (ii) the right to disclose to the public;

(b) Assign or otherwise transfer all of its rights to and interest in all or part of the Specified Data to another person; provided that (i) Licensee provides Dwight's with prior written notice of such assignment or other transfer, including without limitation the name and address of the assignee or transferee, (ii) the assignee or transferee agrees in writing to be bound by all of the provisions hereof applicable to the Specified Data, and (iii) Licensee shall not retain any rights to or interest in any Specified Data assigned or otherwise transferred;

(c) Create distributorships or appoint sales agents for Licensee's data products that include the Specified Data, under agreements appropriate for the distribution of sublicenses of such products; provided that the distributors and sales agents agree in writing to be bound by all of the provisions hereof applicable to the Specified Data, including without limitation the sublicensing thereof;

(d) Grant sublicenses for Licensee's data products that include the Specified Data to geological libraries for access through such libraries only on a read-and-print-only basis; and

(e) Enter into *bona fide* data exchange agreements, wherein the recipient of rights in respect of the Specified Data has the right to market and sublicense the Specified Data; provided that such recipient shall not grant any sublicense of any of the Specified Data, or otherwise knowingly make any of the Specified Data available, to any person unless such person has agreed in writing not to sublicense the Specified Data and not to make the Specified Data publicly available; and provide also that such recipient agrees in writing to be bound by all of the provisions hereof applicable to the Specified Data.

All sublicense, assignments and other transfers permitted by this paragraph 6 shall be in writing and shall expressly provide that the restrictions contemplated by paragraph 4(c) and this paragraph 6 shall be enforced by Licensee, its licensor and the respective successors and assigns thereof. Upon Dwight's reasonable request from time to time. Licensee shall provide Dwight's with the forms of agreement used by Licensee so as to verify compliance by Licensee with the requirements of this paragraph 6.

7. LIMITATION OF LIABILITY: INDEMNIFICATION

(a) Dwight's represents and warrants that it holds such right, title and interest in the Specified Data as may be required to permit Dwight's to enter into and perform its obligations under this Agreement. THE SPECIFIED DATA AND THE MEDIA UPON WHICH THEY ARE SUPPLIED ARE PROVIDED "AS IS." DWIGHT'S MAKES NO OTHER REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANT LIABILITY, FITNESS FOR A PARTICULAR PURPOSE OR ERROR-FREE USE ALL OF WHICH ARE EXPRESSLY

DISCLAIMED. DWIGHT'S MAKES NO REPRESENTATIONS AND WARRANTIES THAT THE SPECIFIED DATA CONTAIN NO ERRORS OR OMISSIONS AND EXPRESSLY DISCLAIMS ANY LIABILITY FOR ALL ERRORS AND OMISSIONS IN THE SPECIFIED DATA. Dwight's is under no obligation to continue the development of the specified data or to correct any error therein.

(b) IN NO EVENT SHALL DWIGHT'S BE LIABLE TO LICENSEE, OR ANY END-USER OR ANY OTHER THIRD PARTY FOR ANY LOSS OR DAMAGE, INCLUDING WITHOUT LIMITATION ANY LOSS OF USE, ANY DECISIONS MADE USING ANY OF THE SPECIFIED DATA, OR ANY LOST PROFIT, INCIDENTAL, SPECIAL AND/OR CONSEQUENTIAL DAMAGES, EVEN IF DWIGHT'S HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. In the event Licensee corrects any erroneous information licensed by Dwight's hereunder after the delivery thereof pursuant hereto, Dwight's shall have no interest in the correction. Dwight's shall have no obligation to provide Licensee with any corrections it makes in the Specified Data after the delivery thereof pursuant hereto.

(c) LICENSEE'S SOLE REMEDY IN RESPECT OF THE SPECIFIED DATA SHALL BE REPLACEMENT OF THE DATA IN QUESTION.

(d) THE LIMITATIONS CONTAINED IN THIS PARAGRAPH 7 SHALL APPLY EVEN IF ANY LIMITED REMEDY FAILS IN ITS ESSENTIAL PURPOSE.

(e) Licensee shall indemnify, defend, and hold harmless Dwight's and its affiliates, employees, officers and directors from and against any and all sums, costs, damages, judgments, losses and expenses (including without limitation reasonable attorneys' fees and disbursements) which Dwight's or any of its affiliates, employees, officers or directors may incur or be obligated to pay as a result of (i) any claims for infringement of any copyright or other proprietary rights as to the data products marketed by Licensee (other than the Specified Data licensed hereunder that may be incorporated therein) or resulting from or relating to any modification, reformatting or coding of the Specified Data or the combination thereof with other data, or (ii) any claim or action resulting from or arising out of the sublicensing, assignment or other transfer of the Specified Data or the use of the Specified Data by Licensee or by any sublicensee, assignee or other transferee of Licensee (other than a breach by the sublicensee, assignee or transferee of the terms of its sublicense, assignment or transfer that satisfy, to the extent applicable, the requirements of paragraph 4 and 6 hereof). SUCH INDEMNIFICATION SHALL APPLY NOTWITHSTANDING ANY NEGLIGENCE (WHETHER SOLE OR CONTRIBUTORY) ON THE PART OF ANY INDEMNIFIED PERSON. Licensee may assume the defense of any matter for which indemnification under this paragraph (e) is sought with counsel reasonably acceptable to Dwight's, which may be Licensee's own counsel. If Licensee so assumes such defense, it shall take all steps reasonably necessary in the defense or settlement of the matter at its own expense; provided that an indemnified person may participate in such defense with its own counsel but only at such indemnified person's own expense. Licensee may not consent to any settlement of any such matter insofar as it affects such indemnified person without such person's written consent.

## 8. INJUNCTIVE RELIEF

Licensee acknowledges and agrees that (a) the Specified Data and other information provided pursuant to this Agreement are unique and consist of valuable intellectual property that Dwight's will continue to use in its business, (b)

the publication, disclosure or misuse of the Specified Data and other information provided pursuant to this Agreement by Licensee or by its sublicensees, assignees and other transferees in violation of the restrictions provided in this Agreement will cause grave harm to Dwight's and (c) Dwight's remedy at law for a breach by Licensee of this Agreement will be inadequate. In the event of a breach or threatened breach of this Agreement by Licensee, Dwight's shall be entitled to obtain injunctive relief, specific performance and such other equitable relief in respect of Licensee and its sublicensees, assignees and other transferees. The foregoing shall in no way limit any other remedies to which Dwight's may be entitled under this Agreement, at law or in equity.

9. TECHNICAL ASSISTANCE

For up to 12 months after the Effective Date, upon reasonable notice to Dwight's from Licensees, Dwights's shall provide such technical assistance to Licensee as is reasonably necessary to enable Licensee to sublicense the Specified Data to end-users. Such technical assistance shall include reasonable consultation with knowledgeable employees of Dwight's sufficient so that Licensee's personnel may be appropriately trained in the sources and processing of the data contained in the Specified Data. Licensee shall pay Dwight's, within 30 days after each invoice therefor. Dwight's direct costs for providing such technical assistance, together with all sales, service, use or similar taxes payable in respect thereof. Direct costs consist of all out-of-pocket expenses, the salary and benefits attributable to Dwight's employees actually providing assistance for the time required for the provision of such assistance, and all other variable overhead. Any past due invoiced amounts shall bear interest at the lesser of 12% per annum or the highest rate allowed by applicable law from the date when due. Dwight's may cease the provision of such technical assistance if any such amounts remain unpaid for 60 days.

10. VERIFICATION OF DATA

Upon 24 hours' advance notice to Dwight's from Licensee, Dwight's shall provide Licensee, at Licensee's expense, reasonable access to, and the right to copy, any data-source documents or data in Dwight's possession that was used to compile the Specified Data, to the extent that Dwight's has such data-source document or data at the time of the request. Such documents and data may be used to verify or to correct the information contained in the Specified Data. Licensee shall not use the information contained therein for any other purpose and shall otherwise keep such information confidential at all times. Licensee shall pay Dwight's, within 30 days after each invoice therefor, Dwight's direct costs in providing such access or copying, together with all sales, service, use or similar taxes payable in respect thereof. Direct costs consist of all out-of-pocket expenses, the salary and benefits attributable to Dwight's employees for the time required for the provision of such access and copying, and all other variable overhead. Any past due invoiced amounts shall bear interest at the lesser of 12% per annum or the highest rate allowed by applicable law from the date when due. Dwight's may cease the provision of such access and copying if any such amounts remain unpaid for 60 days.

11. RIGHTS UNDER ADDITIONAL CONTRACTS

Within ten days after the Effective Date, Dwight's shall assign to Licensee, without any representation or warranty of any kind and without recourse, all of its rights under and interest in (a) the Data Exchange Agreement of July 1, 1993, with The Independent Oil & Gas Service, Inc., and (b) the Joint Marketing Agreement of July 1, 1994, with Munger Oil Information Services, Inc. (each an "Agreement to be Assigned"). No such assignment shall become effective until the other parties thereto consent to such assignment. If either such other party does not consent to such assignment, any well data to which Dwight's has an ownership right upon termination by Dwight's of the applicable Agreement to be Assigned (i) shall be deemed included in the Specified Data and licensed to Licensee hereunder on all of the terms and conditions provided herein and (ii) shall be delivered to Licensee as soon as practicable after such termination.

12. ATTORNEYS' FEES

Should either party institute any action or proceeding to enforce this Agreement or any provision hereof, or for damages by reason of any alleged breach of this Agreement, or for a declaration of rights hereunder, the prevailing party in any such action or proceeding shall be entitled to receive from the other party all costs and expenses, including reasonable attorneys' fees and disbursements, incurred by the prevailing party in connection with such action or proceeding.

13. EXCUSABLE DELAYS

Neither party shall be liable or responsible for delay or failure to perform any of such party's obligations under this Agreement (other than the payment of money) occasioned by any cause beyond its reasonable control, including but not limited to war; civil disturbance; fire; flood; earthquake; windstorm; unusually severe weather; acts or defaults of common carriers; accidents; strike or other labor trouble; lack of or inability to obtain materials, transportation, labor, fuel or supplies; governmental laws, acts, regulations, embargoes, or orders (whether or not such later prove to be invalid); or any other cause, contingency or circumstance not subject to such party's reasonable control.

14. RELATIONSHIP OF PARTIES

Nothing contained in this Agreement shall be construed to imply a joint venture, partnership, or agency relationship between Dwight's and Licensee. Neither party shall be liable for the debts, obligations, or responsibilities of the other party, and neither party shall have the right or authority to assume or create any obligation or responsibility, whether express or implied, on behalf of or in the name of the other party or to bind the other party in any manner.

15. ENTIRE AGREEMENT

This Agreement embodies the entire contractual agreement of the parties in relation to the subject matter hereunder, and there is no other oral or written agreement or understanding between the parties at the time of execution hereof. This Agreement cannot be modified except by the written agreement of both parties hereto. This Agreement is performable in and shall be governed by and construed

and enforced in accordance with the laws of the State of Texas. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their successors, assigns and transferees; provided that Licensee may not sublicense, assign or otherwise transfer the License and any other rights under this Agreement except to the extent permitted by, and in compliance with, paragraph 4 and 6 hereof. It is hereby acknowledged and agreed that from an after the Effective Date, the obligations of Dwight's hereunder shall be performed solely by its successor, Petroleum Information/Dwight's, and Petroleum Information/Dwight's shall receive all the rights and benefits contemplated under this Agreement, and Dwight's shall have not liability therefor.

SCHEDULE A

I. Dwight's Production Data CD-Rom Products

West Coast Area, consisting of California, Oregon, Pacific Federal Offshore, Alaska

Gulf Coast Area, consisting of Arkansas, Louisiana, Mississippi, Alabama, Florida, Federal Offshore, Coastal Counties of Texas

MidContinent Area, consisting of Arkansas, Kansas, Michigan, Oklahoma and Texas Railroad Commission District 10. Texas Area, consisting of all of Texas

Rocky Mountain Area, consisting of Arizona, Colorado, Montana, New Mexico, North Dakota, South Dakota, Wyoming, Nebraska, Nevada, Utah

II. Dwight's Discover SCOUT CD-ROM Products

Gulf Coast Area, consisting of Arkansas, Louisiana, Mississippi, Alabama, Florida, Federal Offshore

MidContinent Area, consisting of Northern Arkansas, Michigan, Oklahoma and Texas Railroad Commission District 10 Texas Area, consisting of all of Texas

Rocky Mountain Area, consisting of Arizona, Colorado, Montana, New Mexico, North Dakota, South Dakota, Wyoming, Nebraska, Nevada, Utah, Idaho

III. Dwight's Discover CD-ROM Products

Oklahoma Area, consisting of Oklahoma

Rocky Mountain Area, consisting of Arizona, Colorado, Montana, New Mexico, North Dakota, South Dakota, Wyoming, Nebraska, Nevada, Utah, Idaho

IV. Dwight's Petroleum Reservoirs (DPR) With Operated Production CD-ROM Products

State of Alaska

State of California

Permian Basin

Texas & Southeast New Mexico

State of Oregon

Gulf Coast Area, consisting of Alabama, Arkansas, Florida, Gulf of Mexico Offshore, Louisiana, Mississippi, Texas Railroad Commission Districts 2, 3, and 4

MidContinent Area, consisting of Arkansas, Kansas, Oklahoma, Texas Railroad Commission District 10

Rocky Mountain Area, consisting of Arizona, Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming, New Mexico

# ANNEX 1

Well Data
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## Record Layout for Comma Delimited File

The option to export WDS information in a comma delimited format provides additional flexibility for importing data into spreadsheet and database management programs.

Each field within a record is separated by commas. Fields are not alpha or Zero filled. Alpha fields are surrounded by double quotes; any field without quotes is read as numeric.

READER & LOCATION INFORMATION
FILE NAME: *.RDR

| Item Name | Format | Maximum Length | Length With Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 10) | N | 2 | 3 |
| FULL API NUMBER | A | 10 | 13 |
| API STATE CODE | A | 2 | 5 |
| API COUNTY CODE | A | 3 | 6 |
| API WELL CODE | A | 5 | 8 |
| MERIDIAN CODE | A | 2 | 5 |
| SECTION | N | 2 | 4 |
| TOWNSHIP | N (3,1) | 3 | 6 |
| TOWNSHIP DIRECTION | A | 1 | 4 |
| RANGE | N (3,1) | 3 | 6 |
| RANGE DIRECTION | A | 1 | 4 |
| QUARTER QUARTER | A | 12 | 15 |
| FOOTAGE NORTH/SOUTH | N | 5 | 6 |
| FOOTAGE DIRECTION NORTH/SOUTH | A | 1 | 4 |
| FOOTAGE EAST/WEST | N | 5 | 6 |
| FOOTAGE DIRECTION EAST/WEST | A | 1 | 4 |
| FOOTAGE CORNER | A | 2 | 5 |
| FOOTAGE QUADRANT | A | 2 | 5 |
| OPERATOR CODE | N | 6 | 7 |
| OPERATOR | A | 40 | 43 |
| LEASE NAME | A | 32 | 35 |
| WELL NUMBER | A | 6 | 9 |
| ELEVATION | N | 5 | 6 |
| ELEVATION TYPE | A | 2 | 5 |
| FIELD NAME | A | 30 | 33 |
| FIELD CODE | N | 9 | 10 |
| RESERVOIR | A | 24 | 27 |
| OBJECTIVE DEPTH - MEASURED | N | 5 | 6 |
| OBJECTIVE DEPTH - TVD | N | 5 | 6 |
| OBJECTIVE FORMATION | A | 24 | 27 |
| OBJECTIVE FORMATION AGE CODE | N | 3 | 4 |
| WELL TYPE | A | 2 | 5 |
| COMPLETION TYPE | A | 2 | 5 |
| OLDEST FORMATION REPORTED | A | 24 | 27 |
| OLDEST FORMATION AGE CODE | N | 3 | 4 |
| FILE STATUS FLAG | A | 1 | 4 |
| CURRENT STATUS | A | 5 | 8 |
| ENTRY DATE (yyyymmdd) | N | 8 | 9 |
| CHANGE DATE (yyyymmdd) | N | 8 | 9 |
| PERMIT DATE (yyyymmdd) | N | 8 | 9 |
| PERMIT NUMBER | A | 8 | 11 |
| OFFSHORE FLAG | A | 1 | 4 |

* Record layout described for future implementation of data item; currently not populated.

# ANNEX 1

Well Data
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LATITUDE & LONGITUDE
FILE NAME: *.LL

| Item Name | Format | Maximum Length | Length With Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 10) | N | 2 | 3 |
| LAT-LONG SOURCE | A | 6 | 9 |
| LATITUDE | N (3,5) | 10 | 11 |
| LONGITUDE | N (3,5) | 10 | 10 |

PERMIT & COMPLETION DATA
FILE NAME: *.CMP

| Item Name | Form Length | Maximum Delimited | Length with |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 20) | A | 2 | 3 |
| SPUD DATE (yyyymmdd) | N | 8 | 9 |
| CONTRACTOR | A | 24 | 27 |
| RIG NUMBER | A | 16 | 19 |
| CIRCULATION MEDIUM | A | 1 | 4 |
| TOTAL DEPTH - MEASURED | N | 6 | 6 |
| * TOTAL DEPTH - TVD | N | 6 | 6 |
| TOTAL DEPTH DATE (yyyymmdd) | N | 8 | 9 |
| FORMATION AT TOTAL DEPTH | A | 24 | 27 |
| FORMATION AT TD AGE CODE | N | 3 | 4 |
| PLUGBACK DEPTH | N | 6 | 6 |
| COMPLETION DATE (yyyymmdd) | N | 8 | 9 |
| COMPLETION CODE | A | 2 | 5 |
| FINAL STATUS | A | 8 | 8 |
| PRODUCING LEASE NUMBER | N | 7 | 8 |
| PRODUCING WELL NUMBER | N | 7 | 8 |
| LOCATION REPORT DATE (yyyymmdd) | N | 8 | 9 |
| COMPLETION REPORT DATE (yyyymmdd) | N | 8 | 9 |
| * DATA SOURCE | A | 6 | 9 |
| * DATA SOURCE WELL ID | A | 26 | 29 |

* Record layout designed for future implementation of data item; currently not populated.

# ANNEX 1

Well Data
Annex 1
Page 3 of 7

TOPS RECORDS
FILE NAME: *.TOP

| Item Name | Type | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 30) | N | 2 | 3 |
| TOP SOURCE | A | 1 | 4 |
| FORMATION TOP TYPE | A | 1 | 4 |
| FORMATION DEPTH | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | N | 2 | 3 |

ALL NARRATIVE FILE
FILE NAME: *.TXT

| Item Name | Type | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD FORMAT | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| RECORD SUB-SEQUENCE NUMBER | N | 3 | 4 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE | N | 2 | 3 |
| INFORMATION TYPE | A | 8 | 11 |
| ** NARRATIVE INFORMATION | A | | |

PARSED CORE DATA
FILE NAME: *.COR

| Item Name | Type | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value: 8) | N | 1 | 2 |
| INFORMATION TYPE (constant value: core) | A | 4 | 7 |
| TEST NUMBER | N | 3 | 4 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | N | 2 | 3 |
| REMARKS | A | 27 | 30 |
| ** CORE NARRATIVE | A | | |

** [illegible]

# ANNEX 1

Well Data
Annex 1
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PARSED DST DATA
FILE NAME: *.DST

| Data Name | Code | Maximum Length | Length with Decimal |
|---|---|---|---|
| WCR ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| RECORD SUB-SEQUENCE NUMBER | N | 3 | 4 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value: 10) | N | 2 | 3 |
| INFORMATION TYPE (constant value: DST) | A | 3 | 6 |
| TEST NUMBER | N | 3 | 4 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | N | 3 | 4 |
| STATUS REMARKS | A | 8 | 11 |
| FIRST TIME OPEN | N | 3 | 4 |
| FIRST TIME SHUT IN | N | 3 | 4 |
| SECOND TIME OPEN | N | 3 | 4 |
| SECOND TIME SHUT IN | N | 3 | 4 |
| INITIAL HYDROSTATIC PRESSURE | N | 5 | 6 |
| FINAL HYDROSTATIC PRESSURE | N | 5 | 6 |
| FIRST INITIAL FLOW PRESSURE | N | 5 | 6 |
| FINAL INITIAL FLOW PRESSURE | N | 5 | 6 |
| SECOND FLOW PRESSURE | N | 5 | 6 |
| SECOND FINAL FLOW PRESSURE | N | 5 | 6 |
| FIRST SHUT-IN PRESSURE | N | 5 | 6 |
| SECOND SHUT-IN PRESSURE | N | 5 | 6 |
| BOTTOM HOLE TEMPERATURE | N | 5 | 6 |
| RESISTIVITY | N | 6 | 7 |
| RECOVERY 1 VALUE | N | 5 | 6 |
| RECOVERY 1 DESCRIPTION | A | 25 | 28 |
| RECOVERY 2 VALUE | N | 5 | 6 |
| RECOVERY 2 DESCRIPTION | A | 25 | 28 |
| RECOVERY 3 VALUE | N | 5 | 6 |
| RECOVERY 3 DESCRIPTION | A | 25 | 28 |
| RECOVERY 4 VALUE | N | 5 | 6 |
| RECOVERY 4 DESCRIPTION | A | 25 | 28 |
| ** SAMPLE NARRATIVE | N | | |

** Length of narrative is location

# ANNEX 1

Well Data
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PARSED SHOWS
FILE NAME: *.SHO

| Data Name | Type | Maximum Length | Length with Decimals |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 2 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 1 |
| INFORMATION TYPE CODE (constant value 12) | N | 2 | 2 |
| INFORMATION TYPE (constant value: Shows) | A | 5 | 5 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | A | 4 | 4 |
| REMARKS | A | 27 | 30 |
| ** SHOW NARRATIVE | A | | |

PARSED PERFS
FILE NAME: *.PER

| Data Name | Type | Maximum Length | Length with Decimals |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 2 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 1 |
| INFORMATION TYPE CODE (constant value: 21) | N | 2 | 2 |
| INFORMATION TYPE (constant value: Perfs) | A | 5 | 5 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | A | 4 | 4 |
| REMARKS | A | 27 | 30 |
| ** PERF NARRATIVE | A | | |

PARSED PICKS
FILE NAME: *.PIC

| Data Name | Type | Maximum Length | Length with Decimals |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 2 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 1 |
| INFORMATION TYPE CODE (constant value: 23) | N | 2 | 2 |
| INFORMATION TYPE (constant value: Picks) | A | 5 | 5 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | A | 4 | 4 |
| REMARKS | A | 27 | 30 |
| ** PAY ZONE NARRATIVE | A | | |

** [illegible]

# ANNEX 1

Well Data
Annex 1
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INITIAL POTENTIAL
FILE NAME: *.IP

| Item Name | Type | Maximum Length | Length with Decimals |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 40) | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value: 20) | N | 2 | 3 |
| INFORMATION TYPE (constant value: IP) | A | 2 | 5 |
| VOLUME, OIL | N | 5 | 6 |
| UNITS OIL VOLUME | A | 7 | 10 |
| VOLUME, GAS | N | 5 | 6 |
| UNITS GAS VOLUME | A | 7 | 10 |
| VOLUME, WATER | N | 5 | 6 |
| UNITS WATER VOLUME | A | 7 | 9 |
| ** IP NARRATIVE | A | | |

COMBINED PERF, PECNL, AND IP RECORD
FILE NAME: *.PPI
(Available in June 1991 Release)

| Item Name | Type | Maximum Length | Length with Decimals |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE | N | 2 | 3 |
| RECORD SEQUENCE NUMBER | N | 5 | 6 |
| INFORMATION SOURCE | A | 1 | 4 |
| INFORMATION TYPE CODE (constant value: 21) | N | 2 | 3 |
| INFORMATION TYPE (constant value: Perfs/Picnic) | A | 5 | 6 |
| INTERVAL TOP | N | 5 | 6 |
| INTERVAL BOTTOM | N | 5 | 6 |
| FORMATION NAME | A | 24 | 27 |
| FORMATION AGE CODE | N | 2 | 3 |
| CHOKE SIZE | A | 5 | 8 |
| FLOW TUBING PRESSURE | N | 5 | 6 |
| FLOW CASING PRESSURE | N | 5 | 6 |
| SHUT IN TUBING PRESSURE | N | 5 | 6 |
| SHUT IN CASING PRESSURE | N | 5 | 6 |
| GRAVITY | N (2.1) | 3 | 6 |
| OIL VOLUME | N | 5 | 6 |
| OIL UNITS | A | 7 | 10 |
| GAS VOLUME | N | 5 | 6 |
| GAS UNITS | A | 7 | 10 |
| WATER VOLUME | N | 5 | 6 |
| WATER UNITS | A | 7 | 10 |
| METHOD OF TEST | A | 3 | 6 |
| CALCULATED FLAG | A | 1 | 4 |
| GOR | N | 10 | 11 |
| REMARKS | A | 27 | 30 |
| ** PERF NARRATIVE | A | | |

** Length of narrative is indefinite

# ANNEX 1

Well Data
Annex 1
Page 7 of 7

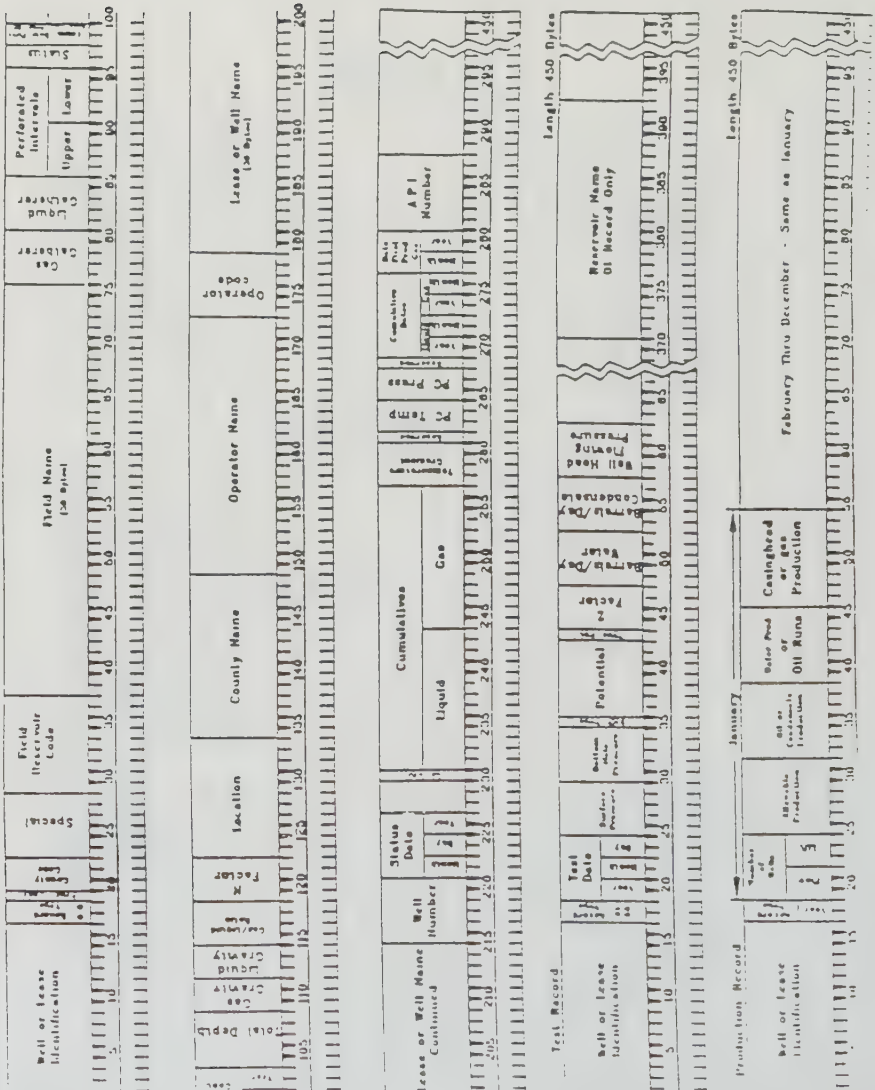
OPERATOR & NAMES LOOKUP TABLES
FILE NAME: *.LUT

| Item Name | Form | Maximum Length | Length with Delimiters |
|---|---|---|---|
| WDS ID | A | 8 | 11 |
| RECORD TYPE (constant value: 90) | N | 2 | 3 |
| DWIGHTS OPERATOR CODE | N | 6 | 7 |
| OPERATOR ADDRESS | A | 64 | 67 |
| API STATE CODE | N | 2 | 5 |
| POSTAL ABREV | A | 2 | 5 |
| STATE NAME | A | 20 | 23 |
| API COUNT CODE | N | 3 | 6 |
| COUNTY NAME | A | 20 | 23 |
| * DWIGHTS DISTRICT CODE | N | 3 | 4 |
| DISTRICT NAME | A | 25 | 28 |
| AAPG BASIN CODE | N | 3 | 4 |
| AAPG BASIN NAME | A | 25 | 28 |
| COUNTRY CODE | A | 4 | 7 |
| COUNTRY NAME | A | 20 | 22 |

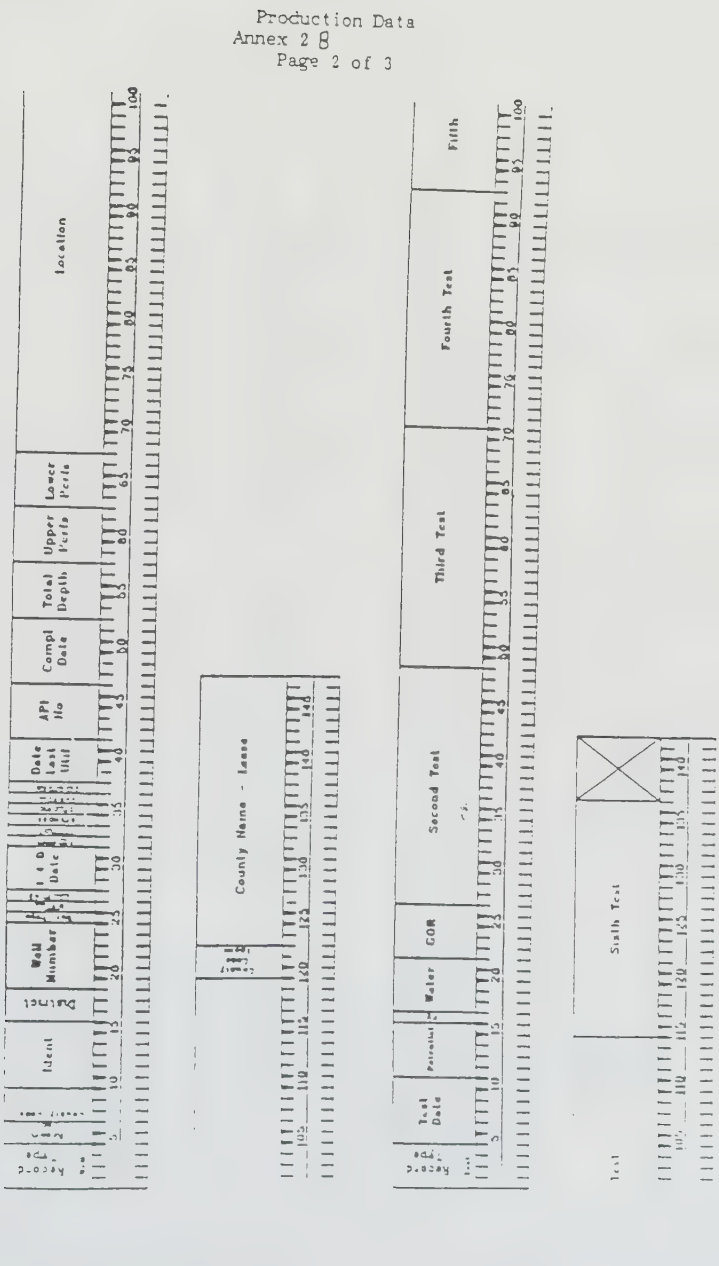
* Record layout designed for future implementation of data item, currently not populated.

## ANNEX 2

Production Data
Annex 2 A
Page 1 of 3



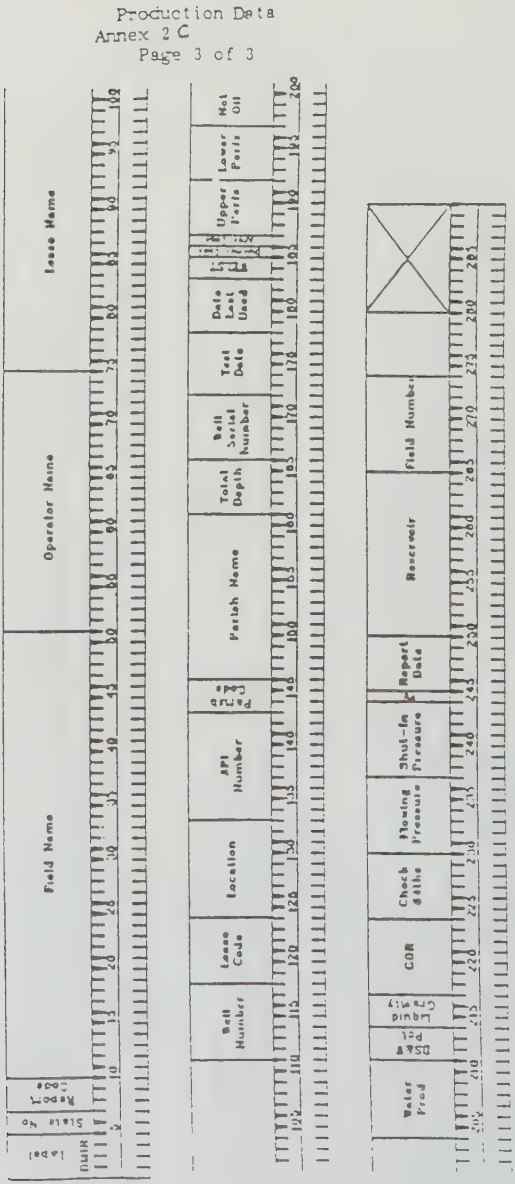
ANNEX 2


Production Data
Annex 2 8
Page 2 of 3
TEXAS OIL TEST RECORD LAYOUT
Ident
Well Number
Date Last Well
API No
Compl Date
Total Depth
Upper Perfs
Lower Perfs
Location
County Name - Lease
Test Date
Water
GOR
Second Test
Third Test
Fourth Test
Fifth
Sixth Test

ANNEX 2

Production Data
Annex 2 C
Page 3 of 3

LOUISIANA OIL TEST RECORD LAYOUT



ANNEX 3

DWIGHT'S

PETROLEUM DATA SYSTEM

TOTL FORMAT

DPDS/TOTL Fixed-Format Specification

Tape Structure

A DPDS/TOTL Fixed-Format data tape contains data from the Dwight's Petroleum Data System Oil and Gas file (TOTL) database. There are three versions of the DPDS/TOTL Fixed-Format file:

The Initial Load format will contain all information about each Field or Reservoir.

The Update format will contain only information that has been updated since the previous release.

The Special format will contain all information about each Field or Reservoir in a custom-defined area.

There are multiple physical files per tape. Each tape begins with a Tape Header File. This file contains one record, a Tape Header Record (Record type 0000), which identifies the information present on the tape. The remaining files are divided into TOTL Area Groups. Each TOTL Area Group has:

File Header File. This file contains one record, a File Header Record (Record Type 0001), which identifies the DPDS Area to which the data file applies.

Data File. This file contains the actual DPDS/TOTL data. Refer to the attached tape specifications for the format of the data file. The last record in the Data File will always be a File Total Record (Record Type 9900). The File Total Record contains control totals which can be used to verify that the update completed successfully.

The last file on the tape is a Tape Total File. This file contains one record, a Tape Total Record (Record Type 9999), which contains control totals which can be used to verify that the update completed successfully.

Each file on the DPDS/TOTL Fixed-Format tape has a record length of 140. The records are blocked at 114 records per block for a blocksize of 15,960.

Tapes can be produced using either the EBCDIC or ASCII character set.

Tapes can be produced at a density of 1600 or 6250 bpi.

Dwight's uses industry-standard 2400 feet, 9-track tapes.

Record Type Relationships

Each record contains a Unique Record identifier and a Transaction Code. The Unique Record Identifier (UNIQID) will specifically identify one, and only one, field or reservoir record in DPDS/TOTL. The Transaction Code indicates the action to be taken to update the data associated with the TOTL field or reservoir record. There are three Transaction Types:

The Add Transaction Type (A) indicates that the data on the transaction record did not previously exist and should be added to the file. An initial Load tape will consist of only Add transactions. If an Add transaction is encountered on Record Type 0100, this indicates a new field or reservoir to be added to the file. An Add transaction on other record types indicates that the data on that transaction record should be added to the field or reservoir record identified by the Unique Record Identifier.

The Change Transaction Type (C) indicates that one or more data items on the transaction record has been updated. All data items on the TOTL field or reservoir record should be updated with the values provided on the Change transaction.

The Delete Transaction Type (D) indicates that all data items on the transaction record have been deleted from the DPDS/TOTL file. If a Delete transaction is encountered on Record Type 0100, this indicates that the entire field or reservoir record has been deleted from the DPDS/TOTL file. A Delete transaction on other record types indicates that only those data items on that transaction have been deleted from the field or reservoir record.

Data Types

There are three data types used by the DPDS/TOTL Fixed-Format Specification. The Data Type is indicated by an A, N, or L in the "Type" column of the Fixed-Format Specification that follows. The three data types are:

The Alpha-Numeric data type (A) indicates text data and can contain letters, numbers, and special characters. Alpha-numerica data is left-justified.

The Numeric data type (N) contains a numerica value only. The numbers are FORTRAN-compatible. The numbers do not contain leading zeros, and have an explicit decimal point if not a whole number. A numerica specification is provided in the "Format" column. The numeric specification is given in the format "W.D", where "W" is the total field width, and "D" is the number of decimal digits.

The Logical data type (L) contains either a "1" or a blank. The "1" indicates a "TRUE" condition, and the blank indicates a "FALSE" condition.

## EXHIBIT B

## TRUSTEE AND MARKETING AGREEMENT

TRUSTEE AND MARKETING AGREEMENT (this "Agreement"), dated as of _____ between respondents (as further defined below) and Ben C. Burkett, II ("Trustee").

## PRELIMINARY STATEMENT

On _____, respondents entered into an Agreement Containing Consent Order, attached hereto as Exhibit A, that contemplates the issuance by the Federal Trade Commission (the "FTC") of an order set forth therein (the "order"), which has not yet been issued by the FTC or become final. The terms and provisions of the order shall be considered as if included and fully stated herein. Also, definitions included in the order shall apply throughout this Agreement.

If issued by the FTC, the order (at Article II) requires respondents to divest the Specified Data following completion of the merger. Article III of the order provides that, if respondents have not so divested, the FTC may appoint a Trustee,

and requires that, within 10 days of the FTC appointment of the Trustee, and subject to the prior approval of the FTC. Respondents must execute a trust agreement that transfers to the Trustee all rights and powers necessary to permit the Trustee to effect the divestiture required by the order. For this reason, the parties have prepared this Agreement, which shall be executed if an only if the conditions precedent, as set forth in Article III of the order, have occurred.

The Commission may approve divestiture of parts of the Specified Data to different acquiring entities, but in no event will there be more than one Acquirer for either the whole data set comprising the Specified Data, or any of the same parts of the data set comprising the Specified Data.

Trustee will actively pursue an Acquirer(s) for the Specified Data.

ADDITIONAL DEFINITIONS

In addition to any terms parenthetically defined in the text of this Agreement, and terms defined in the order, the following definitions shall apply throughout:

1. *"Approved Acquirer"* means a Prospective Acquirer that has been approved by the FTC pursuant to Article II of the order.

2. *"Divest"* means to grant a perpetual, worldwide, nonexclusive license to the Acquirer, with the right, subject to the terms of the order, to use, combine with other information, reproduce, market, assign or otherwise transfer, and sublicense the Specified Data.

3. *"Person"* means any individual, corporation, partnership, or other business or legal entity.

4. *"Prospective Acquirer"* means a person with a *bona fide* interest in acquiring the assets to be divested.

5. *"Respondents"* means "Dwight's" and "PIC" as those two terms are defined in the order.

ARTICLE I

1.01. Transfer of Powers. Respondents hereby transfer to Trustee, in trust, and for the duration of the trust as provided in Section 2.03 of this Agreement, and subject to the terms of the order, respondents' right and power to Divest the Specified Data.

1.02. Creation of Trust. Trustee hereby acknowledges receipt of the authority and power to divest the Specified Data in accordance with the terms of the order and to effect its purposes and agrees to hold such authority and power in trust (the "Trust") for the duration of the Trust as provided in Section 2.03 of this Agreement. The purpose of the Trust shall be to effect the prompt divestiture to an Approved Acquirer.

ARTICLE II

2.01. Powers of Trustee. Trustee shall have the rights, duties or powers with respect to the divestiture as set forth in Article III of the order. Any descriptions thereof contained in this Agreement in no way modify respondents' obligations under the order. Any modification of such rights, duties, and powers shall be made in accord with Section 7.04 of this Agreement.

2.02. Trustee's Duties. Trustee's duty shall be to Divest the Specified Data to an approved Acquirer in accord with the order and this Agreement. Trustee shall use Trustee's reasonable efforts to negotiate the most favorable price and terms for respondents in any proposed contract that Trustee submits to the FTC for approval, subject to respondents' absolute and unconditional obligation to Divest at no minimum price as stated in Article III.B.6 of the order.

2.03. Duration of Trustee's Authority. Trustee shall have the power and authority to divest the Specified Data to an Approved Acquirer for a period of twelve (12) months commencing on the latest to occur of (a) the date the assets of Dwight's are transferred to Petroleum Information/Dwight's pursuant to the merger agreement, dated as of ____1996, between Dwight's and PIC (the "Transfer Date"), (b) the date the order become final and (c) the date of Trustee's appointment by the FTC. Such period may be extended pursuant to Article III.B.4 of the order. Such period may be terminated as provided in Section 6.01 of this Agreement.

2.04. Multiple Offers. If Trustee receives *bona fide* offers from more than one Prospective Acquirer, Trustee shall submit all such bids to the FTC, and if the FTC determines to approve more than one such acquiring entity for either the whole data set or for any of the same parts of the data set comprising the Specified Data, Trustee shall divest to the acquiring entity of entities selected by respondents from among those approved by the FTC.

2.05. Confidential and Proprietary Information. Trustee shall maintain the confidentiality of confidential or proprietary information relating to the assets to be divested. Such information may be disclosed only to:

(a) Prospective Acquirers;
(b) Prospective financiers and suppliers of Prospective Acquirers, or
(c) Persons employed by Trustee under Section 3.01 of this Agreement

Who have first executed appropriate confidentiality agreements. Respondents shall permit Prospective Acquirers and their prospective financiers or suppliers to inspect the assets to be divested with or without Trustee being present. Trustee may disclose to the FTC such confidential or proprietary information relating to the assets to be divested as the FTC may request, without the need for execution of a confidentiality agreement.

2.06. Unauthorized Disclosure. Trustee shall not license, divest, or otherwise disclose to any person or use any of the Specified Data or other information obtained from the respondents except as provided in this Agreement or order.

2.07. Reports. Trustee shall submit, sixty (60) days from the date of commencement of the Trustee's power and authority as provided in Section 2.03 of this Agreement and every sixty (60) days thereafter until Trustee's appointment has been completed or this Agreement terminates as provided in Section 6.01 of this Agreement, a confidential report in writing to respondents and the FTC, setting froth Trustee's efforts to accomplish the divestiture including (a) a summary of all discussions and negotiations held with, and the identities of, all interested persons, and (b) copies of offers, counteroffers and correspondence concerning the Prospective Acquirer(s). Trustee shall also provide to respondents and the FTC such other reports of efforts to divest the assets to be divested as respondents or the FTC may require.

2.08. Access to Relevant Information and Facilities. Trustee shall have full and complete access to the personnel, facilities, books and records, related assets

offered for divestiture or to other relevant information as Trustee may reasonably request. Respondents shall develop such financial or other information as Trustee may reasonably request and shall cooperate with any reasonable request of the Trustee. Trustee shall give respondents reasonable notice of any request for such access or such information; however, Trustee may have access to the assets themselves at any time during normal business hours without notice. Trustee shall attempt to schedule any other access or request for information in such a manner as will not unreasonably interfere with respondent's operations.

2.09. Submission of Contracts for Approval. At any time during the duration of the Trust as provided in Section 2.03 of this Agreement, Trustee may submit to the FTC for approval, in accordance with the FTC's Rules governing approval, with a copy to respondents, any contract with a Prospective Acquirer to acquire the assets to be divested. In order to assist the FTC in assessing whether any Prospective Acquirer may be deemed an Approved Acquirer. Trustee may require the Prospective Acquirer to summit to the FTC a verified statement setting forth facts in support of its financial, technical, and marketing capabilities, and intent to use the assets to be divested, and to submit any business plan regarding the same.

2.10. Personal Liability of Trustee. Trustee shall serve without bond or other security and shall use Trustee's best judgment in performing Trustee's duties hereunder. With the exception of Sections 2.05 and 2.06 of this Agreement, Trustee shall be exempt from personal liability, to the extent permitted by law, for any action or decision not to act taken or made in good faith. Trustee shall be liable for misfeasance in performing under this Agreement or to the extent that any loss, claim, damage or liability results from Trustee's gross negligence, willful or wanton acts, or bad faith by the Trustee or Trustee's representatives.

ARTICLE III

3.01. Retention and Payments of Assistants. From the date of commencement of the Trustee's power and authority as provided in Section 2.03 of this Agreement, Trustee shall have authority to retain such consultants, accountants, attorneys, business broker, appraisers, and other representatives and assistants (collectively "Assistants") as Trustee determines are reasonably necessary to assist Trustee to perform Trustee's duties hereunder. Retention of such Assistants shall be at the cost and expense of respondents. Respondents shall be responsible for reasonable fees and expenses for Assistants retained by Trustee hereunder, and such fees and expenses shall be billed separately from Trustee's personal expense and costs. Trustee shall note Trustee's approval of invoices for fees and expenses incurred pursuant to this Section 3.01 and submit the same to respondents no more than five (5) days after receipt of such invoices. Respondents shall pay such invoices in their usual course of payment, unless objected to in accordance with Section 3.03 of this Agreement.

3.02. Monthly Payments: Success Fees. Trustee shall be compensated by respondents for Trustee's services under this Agreement as provided in this Section 3.02.

(a) Respondents shall pay Trustee a retainer of [ ] on the date of execution of this Agreement by respondents and Trustee.

(b) Respondents shall pay Trustee a fee (the "Monthly Payment") of (i) [ ] per month during the first 12 months of the duration of the Trust as provided in Section 2.03 of this Agreement and (ii) [ ] per month thereafter if the duration of the Trust is extended as provided in Section 2.03 of this Agreement. The first Monthly Payment shall be made on the first day of the first month that commences after the commencement of the Trustee's power and authority as provided in Section 2.03 of this Agreement. Successive Monthly Payments shall be paid at the first day of each month thereafter until the earlier of: (A) the date the consummation of the divestiture contemplated hereby or (B) the date of termination of the Trust pursuant to Section 6.01 of this Agreement.

(c) Respondents shall pay Trustee a success fee (the "Success fee") if the divestiture of the Specified Data is consummated during the duration of the Trust as provided in Section 2.03 of the Agreement. The Success Fee shall equal the product of (i) the amount of cash consideration (exclusive of interest on any deferred payment obligation) provided in the definitive divestiture agreement (the "Cash Consideration"), time (ii) the percentage (the "Applicable Percentage") set forth below opposite the period in which the divestiture is consummated and Cash Consideration is first received by respondents, as follows:

| Date of Consummation and First Receipt | Applicable Percentage |
|---|---|
| On or before the expiration of six months after the commencement of the Trustee's powers and authority as provided in Section 2.03 of this Agreement ("First Six Months") | [ ]% |
| After the First Six Months but on or before the expiration of 12 months after the commencement of the Trustee's power and authority as provided in Section 2.03 of this Agreement ("Second Six Months") | [ ]% |
| After Second Six Months | [ ]% |

The Success Fee shall only be payable when, and as a percentage of, the Cash Consideration is received by respondents, and it shall not be payable if the divestiture is not consummated or in respect of any Cash Consideration that is not received by respondents. Notwithstanding the foregoing, if the maximum Success Fee otherwise payable under this Section 3.02(c) would be less than the minimum amounts (each the "Minimum Fee") set forth below opposite the period in which the divestiture is consummated and Cash Consideration is first received by respondents, the Success Fee shall equal the lesser of: (i) such Minimum Fee and (ii) the amount of Cash Consideration provided in the definitive divestiture agreement that is actually received by respondents.

| Date of Consideration and First Receipt | Minimum Fee |
|---|---|
| During First Six Months | $[ ] |
| During Second Six Months | [ ] |
| After Second Six Months | [ ] |

If a Minimum Fee applies such fee shall be payable out of the first amounts of Cash Consideration received by respondents.

3.03. Expenses. Respondents shall reimburse Trustee's reasonable out-of-pocket expenses and costs incurred by Trustee or Trustee's Assistants in connection with the discharge of Trustee's duties and efforts to divest the Specified Assets to be divested. Such expenses and costs shall include reasonable expenses of travel, lodging, meals, incidental items, and personal car mileage at the maximum allowable rate per mile permitted by the Internal Revenue Service.

Respondents may object to payment of any bill submitted by Trustee for the payment of out-of-pocket expenses and costs for Trustee or Trustee's Assistants. Respondent shall make any such objection in writing within seven (7) days of receipt from Trustee of the bill. Payment shall be made for any portion of an amount requested which is not objected to. Any dispute under this Section 3.03 which the parties have not resolved within seven (7) days of any objection shall be submitted to the FTC for determination, which shall be binding on the parties.

3.04. Cost of Collection. Trustee may recover Trustee's costs of collection including reasonable attorneys' fees, if respondents fail to pay compensation or expenses and costs not objected to or not disapproved by the FTC pursuant to Section 3.03 of this Agreement.

ARTICLE IV

4.01. Binders and downpayments. Trustee shall deposit any funds paid by a prospective acquirer as a refundable binder or downpayment in a separate interest bearing bank account with any accrued interest thereon being paid to the party entitled to such funds.

4.02. License of Assets. If the FTC has approved a Prospective Acquirer in accordance with Article III of the order, respondents shall execute a license agreement, and all related documents necessary to license the assets to be licensed; provided that the terms of such agreement and other documents shall be consistent with the order, shall disclaim all representations, warranties and liabilities in respect of the Specified Data by respondents and provide appropriate protection for the confidential and proprietary information of respondents, and shall contain such other provisions as shall be appropriate to licenses of similar property effected in similar circumstances.

4.03. Closing. Trustee shall make reasonable efforts to schedule signings, and closings for the consummation of divestitures, at a place and time determined by Trustee on dates that would provide respondents with at least thirty (30) days' prior notice. If such dates are unreasonably burdensome on the Acquirer, Trustee shall make reasonable efforts to schedule such signings, and closings for the consummation of divestitures, at mutually convenient times for all parties concerned. Trustee shall provide the FTC and respondents with an opportunity to review any closing documents prior to the closings for the consummation of divestitures.

4.04. Final Accounting. Upon the termination of Trustee's duties hereunder, there shall be an accounting ("Final Accounting") of any balance due and owing (i) for Trustee's expenses and costs (pursuant to Section 3.03 of this Agreement), (ii) for Monthly Fees (pursuant to Section 3.02(b) of this Agreement), and (iii) as Incentive Compensation (pursuant to Section 3.02(c) of this Agreement). The Final Accounting shall be approved by the FTC.

ARTICLE V

5.01. Respondents' Duties. Respondents shall use all reasonable efforts to assist and cooperate with Trustee in accomplishing the divestiture as contemplated by the order and this Agreement. Respondents shall take no action to interfere with or impede Trustee's accomplishment of the terms of the order.

5.02. Respondents' Contact with Prospective Acquirers. Respondents shall promptly notify Trustee in writing of any contact it may have with any persona that makes an offer or expresses an interest in acquiring the assets to be divested after the date of commencement of the Trustee's power and authority as provided in Section 2.03 of this Agreement.

5.03. Indemnity of Trustee. With the exception of Section 2.05 and 2.06 of this Agreement, respondents shall indemnify Trustee and hold Trustee harmless against any losses, claims, damages or liabilities to which Trustee may become subject arising in any manner out of or in connection with Trustee's duties under this Agreement and the order, unless such losses, claims, damages, or liabilities arise out of any misfeasance, gross negligence, willful or wanton acts, or bad faith by the Trustee or its representatives.

5.04. Authority to Execute. Respondents represent that the persons executing this Agreement on behalf of respondents have the authority to bind respondents to this Agreement.

ARTICLE VI

6.01. Termination of Agreement and Trust. This Agreement and the Trust established hereby shall terminate upon the earliest to occur of the following: (a) the completion of the divestiture; (b) Trustee's resignation or removal by the FTC for failure to perform Trustee's duties hereunder, (c) the termination of this Agreement by the FTC or (d) the expiration of Trustee's authority under Section 2.03 of this Agreement. Upon termination of the Trust. Respondents shall have no further obligation to pay compensation or expenses to Trustee hereunder, except to pay the compensation and reimburse Trustee for the expenses provided in Article III of this Agreement that have accrued to the date of termination. In furtherance of the foregoing, but not by way of limitation thereof, no Success Fee shall be payable to Trustee in respect of a divestiture that is consummated after the date of any termination. Trustee's obligations under Sections 2.05 and 2.06 of this Agreement and respondents' obligations under Sections 3.04, 4.04 and 5.03 of this Agreement shall survive any termination.

ARTICLE VII

7.01. Notices. The FTC shall be copied on all correspondence between Trustee and respondents. All notices and other communications required or permitted under this Agreement or the order shall be in writing and shall be deemed to have been duly given if personally delivered, mailed by registered or certified U.S. Mail return receipt requested, or delivered by overnight courier or Express Mail, or transmitted by facsimile to the following addresses, or any other address that has been designated in writing to the sending party:

(a) To Trustee:
Ben C. Burkett, II
Burkett Consulting
7126 Alpha Road
Dallas, Texas 75240
Telecopier: 214-239-9037

(b) To respondents:
Dwight's Energydata, Inc.
1633 Firman Dr.
Richardson, Texas 75081
Telecopier: 214-783-0058
Attention: President

GeoQuest International Holdings, Inc.
5333 Westheimer, Suite 100
Houston, Texas 77056
Telecopier: 713-599-9131

(c) To FTC:
Compliance Division
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Telecopier: (202) 326-2655

7.02. No Assignment. This Agreement shall become effective upon the date of execution, subject to the approval of the FTC. This Agreement may not be assigned or otherwise transferred by respondents or Trustee without the consent of respondents and Trustee and the approval of the FTC. Any such assignment or transfer shall be consistent with the terms of the order. It is hereby acknowledged and agreed that from and after the Transfer Date, respondents' obligations hereunder shall be performed solely by their successor, Petroleum Information/Dwight's.

7.03. Entire Agreement. This Agreement, and those portions of the order incorporated herein by reference, constitute the entire agreement of the parties and supersede any and all prior agreements and understandings between the parties, written or oral, with respect to the subject matter hereof.

7.04. Modification. No amendment, modification, termination or waiver of any provision of this Agreement, nor consent to any departure therefrom by any parties hereto, shall be effective unless made in a writing signed by all parties and approved by the FTC. Any such amendment, modification, termination or waiver shall be consistent with the terms of the order.

7.05. Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

7.06. Section Headings. Any heading of the sections of this Agreement are for convenience only and are to be assigned no significance whatsoever as to its interpretation and intent.

7.07. Order Governs. The order shall govern this Agreement and any provisions herein which conflict or are inconsistent with it may be declared null and void by the FTC and any provision not in conflict shall survive and remain a part of this Agreement.

7.08. Governing Law. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Texas (excluding any principles of such law that would apply any other law other than applicable Federal law) and such Federal laws as may apply.

EXHIBIT C

SALES REPRESENTATIVE AGREEMENT

This is an agreement ("Agreement") entered into and effective as of _____("Effective Date") between TOBIN DATA GRAPHICS LLC, a Texas limited liability company, with its principal place of business at 114 Camp Street, San Antonio, Texas 78204, herein referred to as "TDG," and _____ herein referred to as "SR." TDG and SR shall be referred to individually as a "party," and collectively as the "parties." In consideration of the mutual promises and benefits set forth, the parties agree as follows:

Recitals:

TDG and SR desire that SR assist TDG in the marketing and delivery of certain well location information owned by TDG to customers.

**1.0 Definitions.** The following terms shall have the definitions provided.

1.1 *"Coordinate"* shall mean all latitudinal and longitudinal location references calculated or determined by TDG.

1.2 *"Coordinate Fees"* shall mean the use fees to be paid by customers for the Coordinates as descried in Exhibit A hereto. The Coordinate Fees may be revised unilaterally by TDG from time to time; however, such Coordinate Fees will remain equal to or less than the Coordinate fees that TDG establishes with the entity created by the merger of Dwight's Energydata, Inc. and Petroleum Information Corporation. SR will be given thirty days advance written notice of any such revisions.

1.3 *"License Agreement"* shall mean the TDG agreement in the form attached hereto as Exhibit B to be entered into with customers pursuant to Section 2.1 below with such amendments as TDG may require from time to time in its discretion. SR will be given thirty days advance written notice of any such amendments. *"TDG Customer Agreement"* shall mean any agreement entered into between TDG and its customers for Coordinates delivered directly to such customers by TDG.

1.4 *"Person"* shall mean and include natural individuals and an entity of any type.

**2.0 Appointment.** During the term of this Agreement and subject to the other terms hereof, TDG hereby appoints SR on a nonexclusive basis, as a sales representative to assist TDG in the marketing and delivery of Coordinates which have been correlated to SR Well Data, and to bill and collect Coordinate Fees. SR may use its authorized sales agents to assist it provided that such agents comply with all terms and conditions imposed on SR by this Agreement, and that SR is responsible for their actions, in their capacity as sales agents.

2.1.1 License Agreement. Prior to delivering Coordinates to a customer who is not otherwise authorized in writing by TDG to receive Coordinates. SR shall obtain from such customer a signed copy of the License Agreement as in effect hereunder at the time. Each such signed copy shall be delivered to TDG withing thirty days of receipt by SR.

2.1.2 On-line License Agreement. Unless and until instructed otherwise by TDG in writing, SR is deemed to have obtained a valid, but limited, License Agreement from on-line customers only if the following provisions have been

satisfied: (i) SR shall provide a document on screen that describes the License Agreement provisions for viewing or downloading TDG data, (ii) this document must be acceptable to TDG both as to form and content, (iii) any on-line customers must have previously signed a SR license agreement in which the proprietary nature of the on-line data is agreed, (iv) the License Agreement is limited only to on-line delivery of TDG data and only for as long as this paragraph (2.1.2) is in effect, (v) customers are charged, and royalties are due, in accordance with TDG's then current Coordinate Fees schedule, and (vi) TDG is furnished a list of such current customers that have downloaded Coordinates each month.

2.2 Permitted Distribution. Prior to permitting a Person access to a Coordinate, from time to time after the Effective Data, SR must be deemed to have the permission of TDG as provided below ("TDG's Permission"). SR shall be deemed to have TDG's Permission if (i) SR has obtained from such Person a signed License Agreement regarding such Coordinate which is currently effective, (ii) SR has obtained from TDG notice that such Person otherwise has an effective TDG Customer Agreement regarding such Coordinate, or (iii) SR has complied with Section 2.1.2 above for delivery of on-line data. SR shall not be deemed to have TDG's Permission when (i) TDG provides notice to SR that any such License Agreement or TDG Customer Agreement is not effective, (ii) this Agreement is terminated, or (iii) the On-line License Agreement provisions in Section 2.1.2 are no longer valid or acceptable to TDG. The parties hereby agree that all information regarding their respective customers shall be deemed Confidential Information, as defined below, and shall not be used or disclosed for any reason other than to fulfill the purposes of this Section 2.2.

2.3 Activities of SR. With respect to the marketing and delivery of such Coordinates by SR the following shall apply:

a. SR shall represent itself to third parties only as a sales representative of TDG.

b. SR shall not represent to customers with respect to the Coordinates delivered by SR that such customer is being charged less than TDG charges for Coordinates if delivered by TDG. However, SR may at its sole discretion charge more than TDG charges.

c. SR shall not be required to devote any particular time or resources to marketing and delivering the Coordinates.

d. SR shall not represent or warrant (i) that TDG expects to deliver any particular number of Coordinates during any future period, or (ii) that TDG otherwise will or expects to undertake any activity not described in the License Agreement or in TDG's current marketing materials in effect and delivered to SR by TDG from time to time.

e. SR shall not allow any representations to be made that it is an agent or representative of TDG capable of binding TDG in any manner.

f. SR shall make no warranties or representations to third parties as to the accuracy, completeness or other condition of the Coordinates.

**3.0 Coordinate Fees.** SR shall bill customers on behalf of TDG not less than the Coordinate Fees currently in effect from time to time. The current Coordinate Fees are set forth in Exhibit A.

3.1 Collection and Payment. SR shall bill all Coordinate Fees in accordance with its normal procedures for billing its own or similar products. SR shall collect the Coordinate Fees from customers and forward such funds to TDG within thirty days of the end of the calendar month during which such Fees were collected.

3.2 Estimated Payments. SR may bill and collect Coordinate Fees in advance of delivery based on SR's estimate of the number of Coordinates to be delivered for a fixed period. Such Coordinate Fees shall be forwarded to TDG in accordance with Section 3.1 above provided that if the Coordinates actually delivered for the subject period are fewer than the estimate. TDG shall refund the excess payments to SR upon request. However, in accordance with SR's normal procedures. SR may bill its CD-Rom customers at the beginning of each customer's annual license period for all Coordinates available in the area subscribed to at that time. Any new Coordinates added to the are of coverage during the customer's annual license term will not be billed and Coordinate Fees will not be due TDG until the date of such customer's annual renewal term.

**4.0 Coordinates.**

4.1. Delivery and Use of Coordinates. Subject to the items of this Agreement, SR may duplicate and store the Coordinates internally for the sole purpose of delivering them to its customers and may deliver the Coordinates as a stand alone product or incorporate them as part of SR products in Sr's normal course of business. SR shall not deliver, copy, use or disclose to third parties the Coordinates for any other purpose. Notwithstanding the above, SR shall not incorporate Coordinates into any product unless SR can limit individual customer access to the Coordinates ("Security Procedures") in compliance with this Agreement All Security Procedures shall be disclosed to TDG and be reasonably acceptable to TDG.

4.2 Prohibited Transfers. SR may not offer a License Agreement or other right to, or otherwise knowingly make available, any Coordinate, or any component thereof to any of the following: (i) a competitor of TDG, (ii) a government agency, (iii) an entity which might cause such information to be available in the public domain, or (iv) any third party to use the data for the purpose of compiling, adding to, or building a data base or file that such third person could then use, sell, license, or lease to anyone else or for any purpose other than such third party's internal use.

**5.0 Obligations of SR.**

5.1 Reports. On the 30th day after each calendar month, SR will provide TDG the following reports:

A Delivery Report, on a mutually agreeable form, that identifies by area and by recipient the number of Coordinates delivered by SR during the prior calendar month.

A Statement, on a mutually agreeable form, of all sums billed by SR for Coordinates during the prior calendar month.

A Trouble Report identifying any errors in the Coordinates of which SR has actual knowledge.

If the parties cannot agree on a form, TDG shall provide the forms to be used.

**6.0 Marketing and Distribution.** SR shall obtain in writing, prior to use, written approval from TDG of any promotional or other material which uses the

name, trademarks or product names of TDG. Each party shall pay its own advertising, marketing, and distribution expenses.

**7.0 Warranties.** Except as otherwise provided herein, TDG warrants and represents that it has full and unrestricted right to use and to authorize others to use the Coordinates provided to SR. TDG EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND WARRANTIES ARISING FROM COURSE OF CONDUCT AND USAGE OF TRADE ALL COORDINATES AND THE MEDIA UPON WHICH THEY ARE SUPPLIED ARE PROVIDED "AS IS." TDG MAKES NO WARRANTY EITHER EXPRESS OR IMPLIED AS TO THE VALIDITY, ACCURACY, OR COMPLETENESS OF ANY OF SUCH COORDINATES. SR ACCEPTS TDG'S COORDINATES "AS IS" AND WITH ALL FAULTS. TDG DISCLAIMS ANY LIABILITY FOR ALL, IF ANY, ERRORS AND OMISSIONS IN THE COORDINATES SUPPLIED HEREUNDER.

**8.0 General Obligations.**

8.1 Delivery. All data subject hereto shall be delivered in the delivering party's normal course of business and in its standard, electronic, machine readable form except as otherwise mutually agreed to by the parties. Each party shall be responsible for the media and transportation costs of delivering its data to the other party.

8.2 Business Practices. Each party agrees that the services to be provided by it shall be performed in a good and workmanlike manner, and that such services will be performed in accordance with all applicable federal, state and local laws. Each party shall keep full, clear and accurate financial and other records with respect to all data subject hereto including license and other agreements with customers.

8.3 License Enforcement. Each party agrees that it will use its best efforts in normal business practice to ensure that its customers do not use the data subject hereto in violation of this Agreement or the agreement entered into with the customer.

8.4 Inspection. TDG shall have the right at its own expense to inspect and audit those portions of SR's books, records and all associated documents necessary to ensure compliance with the terms and conditions of this Agreement. SR agrees to maintain such books, records and associated documents for a period of two (2) years from the end of the calendar year in which such items were recorded and to make such books, records and associated documents available to TDG at all reasonable times within such period and for so long thereafter as any dispute remains unresolved. So long as a dispute does not exits such inspections and audits shall not be conducted more than twice per year on 30 days prior notice.

**9.0 Confidentiality.**

9.1 Confidential Information. In the course of their mutual dealings, the parties each have become, and will continue to become, aware of the other party's business affairs, property, methods of operation, processing systems, trade secrets, data, software, programs, download formats and related information and technology in various forms and formats which the other party treats for itself or others as proprietary and confidential ("Confidential Information"). Except as otherwise provided herein, each party agrees that (i) the Confidential Information of the other party is the exclusive property of the other party and such other party retains all copyright, trade secret and trademark interests therein, whether published or unpublished, and (ii) it shall observe complete confidentiality with regard to all

aspects of the Confidential Information, and to insure such confidentiality, shall take appropriate action, by instruction, agreement or otherwise, with such party's employees, consultants, contractors, and customers permitted access to such Confidential Information so as to enable such party to satisfy its confidentiality obligations under this Agreement. Each party agrees to limit access to the other party's Confidential Information to those employees and consultants who in the course of their employment need access to such data. If either party provides access to data or Confidential Information to individuals or entities in breach of this Agreement, then such party agrees to indemnify and hold the other party harmless from (i) any and all resulting claims of liability to third parties, and (ii) was acquired by a party from a third party; or (iii) was know to a party prior to its receipt from the other party; shall not be deemed Confidential Information for the purposes of this Agreement or any other agreement between the parties.

9.2 Violations. Without limitation of the foregoing, a party which learns or has reason to believe that any person has had access to the data subject hereto or the Confidential Information, or any portion thereof, and, as a result, the terms of this Agreement are being violated (i) shall advise the other party immediately of such even, and (ii) shall cooperate with the other party in seeking injunctive or other equitable relief against any such third person. All of the undertakings and obligations relating to confidentiality and non-disclosure, whether contained in this paragraph or elsewhere in this Agreement, and whether of either party, shall survive the termination of this Agreement for whatever reason.

**10.0 Proprietary Rights.**

10.1 Infringement. Each party agrees to give prompt notice to the other party of any actual, threatened, or suspected infringement of proprietary, trademark or copyright rights of the other party by any entity or third party and agrees to provide reasonable assistance to the other party in the protection of those rights. Each party also shall give the other prompt notice of any claim that the data subject hereto may violate any rights of a third party.

**11.0 Remedies, Limitation of Liability.** The Coordinates subject hereto and the Confidential Information are unique and each party's remedy at law for a breach of this Agreement by the other party may be inadequate. Each party acknowledges that the disclosure of any aspect of the other party's Confidential Information or any information which, at law or equity, ought to remain confidential, or the breach of any other provision hereof, will give rise to irreparable injury to the other party inadequately compensable in damages. Accordingly, either party may seek or obtain injunctive relief against the breach or threatened breach to the terms of this Agreement, in addition to any other legal remedies which may be available, and each party hereby consents to the obtaining of such injunctive relief.

IN NO EVENT SHALL TDG BE LIABLE FOR ANY LOST PROFIT, INCIDENTAL, SPECIAL, AND/OR CONSEQUENTIAL DAMAGES RESULTING FROM ERRORS OR OMISSIONS IN THE COORDINATES PROVIDED HEREUNDER, EVEN IF TDG HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. SR'S SOLE REMEDY REGARDING DEFECTIVE COORDINATES SHALL BE REPLACEMENT OF THE MEDIA AND COORDINATES IN QUESTION PROVIDED, HOWEVER, THAT SR SHALL BE ENTITLED TO THIS REMEDY ONLY IF TDG IS CAPABLE OF CORRECTING THE COORDINATE IN THE NORMAL COURSE OF ITS BUSINESS. IN NO EVENT SHALL TDG BE LIABLE AS A RESULT OF DEFECTIVE, UNDELIVERED OR MISSING COORDINATES FOR ANY MONETARY AMOUNTS.

**12.0 Term and Termination.**

12.1. Term. This Agreement shall remain in effect for three years unless terminated earlier as provided herein. The period from the Effective Date of this Agreement until its termination is referred to herein as the term of the Agreement.

12.2 Termination Option. Each party shall have the right to terminate this agreement at any time upon giving the other party at least one year prior written notice of such termination. In addition, and upon giving 90 days written notice to SR, TDG shall have the right to terminate this Agreement in the event that it and/or its successor companies (i) in good faith ceases the conduct of calculating and providing Coordinates to customers or (ii) similarly terminates all Sales Representative Agreements that it may have with other sales representatives. On termination of this Agreement, TDG will not deliver additional Coordinates to SR. If this Agreement is terminated by Sr, SR shall immediately return all copies of the Coordinates, and all manifestations of TDG's Confidential Information, and cease using such products and information for all purposes. If this Agreement is terminated by TDG, SR will be allowed, subject to the other provisions of this Agreement, to provide to customers Coordinates previously received, but only for the term of each customer's then existing written agreement (excluding any renewal or extension made or attempted after such term) but not to exceed three years following termination of this Agreement and only for the sole purpose of fulfilling commitments for subscription products in existence on the date of termination. At the end of such time, SR shall immediately return all copies of the Coordinates, and all manifestations of TDG's Confidential Information, and cease using such products and information for all purposes.

**13.0 General.**

13.1 Entire Agreement. This Agreement, including the exhibits hereto, all of which are incorporated herein by this reference, contains the full understanding of the parties with respect to the subject matter hereof, and no waiver, alteration, or modification of any of the provisions hereof shall binding unless in writing and signed by duly authorized representatives of each party. Neither the course of conduct between the parties nor trade usage shall act to modify or alter the provisions of this Agreement. If this Agreement is executed in counterparts, each shall be deemed an original, but all together shall constitute but one and the same agreement.

13.2 Assignment. This entire Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the parties and shall be fully assignable by either party.

13.3 Force Majeure. Neither party shall be liable to the other for delay in the performance of its obligations hereunder to the extent that such delay is due to causes beyond its reasonable control.

13.4 Attorney's Fees. Should any party institute any action or proceeding to enforce this Agreement or any provision hereof, or for damages, by reason of any alleged breach, or for a declaration of rights hereunder, the prevailing party in any such action or proceeding shall be entitled to receive from the other party all costs and expenses, including attorney's fees and disbursements, incurred by the prevailing party in such action or proceeding.

13.5 Authority. Each of the undersigned individuals executing on behalf of the respective signatories hereto warrants and represents to each of the parties hereto that he is duly authorized by such entity on whose behalf he is executing this

Agreement and that he has full power and authority to bind such entity by affixing this signature hereto.

13.6 State Law. This Agreement shall be construed in accordance with, and the rights and obligations of the parties hereunder shall be determined in accordance with, the laws of the State of Texas.

13.7. Notices. Any notice required or permitted hereunder shall be conclusively deemed properly given upon delivery of the same, in writing, in person or by mailing the same by certified mail to the party to be notified at such party's address as set forth in the preamble to this Agreement, or to such other address as may be specified in a notice delivered pursuant hereto

13.8 Severability and Waiver. If any provision of this Agreement is declared by a court of competent jurisdiction to be invalid or unenforceable, or if any provision hereof is or becomes impracticable, the remaining provisions and the Agreement as a whole shall nevertheless continue in full force and effect without being impaired or invalidated in any way, and the parties shall replace the invalid, unenforceable or impracticable provision with a valid, enforceable or practical provision which shall meet the economic aims of the invalid, unenforceable or impracticable provision as closely as possible. No delay in exercising, no course of dealing with respect to, and no partial exercise of any right or remedy hereunder shall constitute a waiver of any other right or remedy, or future exercise thereof. With respect to any continuing or persistent default hereunder, no delay in exercising, no course of dealing with respect to, and no partial exercise of any right or remedy shall constitute a waiver thereof.

13.9 Construction. Headings used throughout this Agreement are for administrative convenience only and shall be disregarded for the purpose or construing and enforcing this Agreement. The language in all parts of this Agreement shall in all cases be construed simply, according to its fair meaning, and shall not be construed strictly for or against either of the parties.

13.10 Other Business. Except as otherwise provided herein, each party shall be allowed to solicit any type customer in any geographic area and enter into software, hardware, data delivery, development, license, and maintenance agreements therewith. The provisions of this Agreement do not grant either party any rights or obligations to act on behalf of the other party regarding any other products or services not specifically mentioned.

13.11 Relationship of Parties. Nothing contained in this Agreement shall be construed to imply a joint venture, partnership, or agency relationship between TDG and SR or any of their employees. Except as specifically set forth herein, no party shall be liable for the debts, obligations, or responsibilities of another party, and no party shall have the right or authority to assume or create any obligation or responsibility, whether express or implied, on behalf of or in the name of another party or to bind another party in any manner.

## EXHIBIT A

# Exhibit A

(To TDG-_____ Sales Representative Agreement dated __/__/__

## Coordinate Fee Schedule

| | Superbase Maintenance Subscribers | | Superbase Maintenance Non-Subscribers | |
|---|---|---|---|---|
| | Gulf Coast(*) | All other areas (Jeffersonian and Carter) | Gulf Coast(*) | All other area (Jeffersonian and Carter) |

I. Perpetual License Fees

For Permitted Well Coordinates

| Number of coordinates | |
|---|---|
| all volumes | |

For Completed Well Coordinates

| Number of coordinates | |
|---|---|
| 1- 10,000 | |
| 10,001- 50,000 | |
| 50,001-120,000 | |
| 120,001 and greater | |

II. Limited Term License Fees (annual)

| Number of coordinates | |
|---|---|
| all volumes | |

III. Second license, multiple copies CD-Rom

| Number of coordinates | |
|---|---|
| all volumes | |

IV. Re-issue fees

| Number of coordinates | |
|---|---|
| all volumes | |

* Gulf Coast includes Texas, Louisiana, Mississippi, Alabama, Florida and Georgia

# EXHIBIT B

## Exhibit B (version 1 of 2, Perpetual License)

(To TDG-_____ Sales Representative Agreement dated __/__/__)

### DATA LICENSE AGREEMENT

By signature below the undersigned Licensee agrees with and for the benefit of Tobin Data Graphics LLC, a Texas limited liability company doing business at 114 Camp Street, San Antonio, Texas 78204 and other locations ("TDG"), that its acceptance, possession and use of the Products, as such term is defined below, are subject to the following terms and conditions, and undertakes to perform the obligations of Licensee set forth below.

1. **Products.** The term "Products" as used in this Agreement means the data more specifically described in the Pricing Schedules, as defined below, including all data, software programs, download formats, user documentation and related information and technology in any form or format provided to Licensee by or on behalf of TDG during the term of this Agreement. However, the term "Products" shall not include any additional TDG products acquired by Licensee subsequent to the execution of this Agreement which are subject to a separate written license agreement.

2. **Pricing Schedules.** The term "Pricing Schedules" means the one or more documents, proposals, orders or invoices prepared by or on behalf of TDG from time to time, duly authorized by TDG and supplied to Licensee to describe further (to the extent TDG deems necessary) the Products, term of the license, and the costs thereof to be paid by Licensee, all of which are incorporated herein by this reference and made part of this Agreement.

3. **Grant of License.** TDG grants to Licensee, subject to the provisions of this Agreement, a nonexclusive, nontransferable, limited license to possess and use those Products for which Licensee has paid the license fees set forth in the applicable Pricing Schedule(s) in furtherance of Licensee's own business and in accordance with this Agreement. TDG shall not be obligated to supply to Licensee more than one representation of each of the Products. If a Product is lost, destroyed, or impaired by Licensee, a replacement may be obtained from TDG or one of its sales representatives for the costs of handling and expenses, subject to mutual agreement at the time of the request.

4. **License Restrictions.** Licensee agrees to use the Products only for Licensee's own business. Licensee shall not: (i) permit any affiliated entities or third parties access to or use of the Products except as specifically set forth below, (ii) use the Products in the operation of a service bureau, to provide time sharing services, or in any other similar arrangement, or (iii) decompile, disassemble or otherwise reverse engineer the Products.

5. **Copies.** Licensee may not copy the Products, except that one (1) copy only may be made for archival purposes. The Products shall remain in a single memory location in Licensee's data system except that portions of the Products may be transferred to other data storage devices under Licensee's exclusive control to display, manipulate and analyze such Products for Licensee's own internal use. Licensee may merge or modify the Products for its own internal use. Hard copies of the Products may be made for Licensee's internal use. Such hard copies shall not be provided to third parties, except if: (i) provided in the regular course of Licensee's business and for the sole purpose of analysis or interpretation in furtherance of Licensee's own business, and (ii) Licensee obtains the prior written agreement of the recipient in the form supplied by TDG to use the Products only for such purpose, to return the hard copies to Licensee, and otherwise to be subject to and comply with this Agreement, and (iii) Licensee assumes responsibility to assure compliance by the third party with such agreement. All copies of Products, including merged or modified portions, shall remain the property of TDG, shall continue to be subject to this Agreement, and shall include all TDG copyright and other proprietary notices.

6. **License Fees.** Licensee agrees to pay TDG or its authorized sales representative for all charges incurred for Products provided to Licensee in accordance with applicable Pricing Schedules. Interest shall be payable on any past due amounts computed from the date due at the lesser of eighteen percent (18%) or the highest rate allowed by law. In addition to the charges otherwise payable hereunder, Licensee shall be responsible for and pay all taxes, however designated, levied or based on charges made under this Agreement, exclusive of taxes based on the net income of TDG. If any amounts due under this Agreement have not been paid in full within thirty (30) days after they are due, then without limitation of any other remedies and rights TDG may have, TDG may at its discretion and without prior notice to Licensee terminate this Agreement.

7. **Term and Termination.** This Agreement shall become effective on the date Licensee executes it and shall remain in effect until, if ever, Licensee shall breach any provision hereof, in which event it shall terminate automatically without the requirement of any notice or other action by TDG, provided that Licensee shall have thirty (30) days grace for payments as described above. Upon notice by TDG at any time after termination for any reason of this Agreement, Licensee shall within ten (10) days return to TDG, at Licensee's expense, the Products and all copies thereof, delete or destroy all other copies and representations of the Products, and deliver to TDG written certification by an officer of Licensee that the Products have been returned, all copies have been deleted or destroyed, and the use of the Products has been discontinued. If this Agreement is terminated for any reason relating to any breach by Licensee, all provisions hereof to the benefit of TDG shall survive and remain in effect, but Licensee shall not be entitled to possess or use the Products, shall not be entitled to any refund or have any other rights or remedies pursuant hereto.

8. **Proprietary Rights.** The Products are proprietary to TDG, and title to them remains in TDG. Some or all of the Products may be delivered to Licensee incorporated in or integrated as part of other information technology products offered and distributed by sales representatives of TDG. Notwithstanding any such integration or incorporation all right, title and interest in and to the Products are and remain the sole and exclusive property of TDG. All applicable common law and statutory rights in the Products including, without limitation, rights in confidential and trade secret material, data, source code, object code and copyrights, shall be and will remain the property of TDG. Licensee shall have no right, title or interest in such proprietary rights or in the Products, except the license to use the Products as granted hereby.

9. **Confidential Information.** Licensee agrees that the Products contain proprietary information, including trade secrets, know-how and confidential information, that is the exclusive property of TDG. During the period this Agreement is in effect and after its termination for any reason, Licensee and its employees and agents shall maintain the confidentiality of this information, and shall not sell, license, publish, display, distribute, disclose or otherwise make available this information to any third party nor use such information except as authorized by this Agreement. To insure such confidentiality, Licensee shall take appropriate action by instruction, agreement or otherwise with Licensee's employees, consultants, contractors and other [illegible] persons permitted access to the Products [illegible]

# EXHIBIT B

satisfy Licensee's confidentiality obligations under this Agreement. Licensee agrees to limit access to the Products to those employees and/or consultants who in the course of their employment need access to the Products. Licensee shall not remove such proprietary notices as TDG or its sales representatives may choose to place with or on the Products. Licensee shall immediately report to TDG, and halt unauthorized use or disclosure of the Products.

10. **Limited Warranty; Limitation of Liability.** TDG warrants: (i) that it has the authority to license the Products to Licensee, and (ii) if supplied by TDG, that the media on which the Products are recorded is free from defects in material and workmanship under normal use for a period of ninety (90) days from delivery to Licensee.

EXCEPT AS PROVIDED IN THE PRECEDING SENTENCE, THE PRODUCTS AND THE MEDIA UPON WHICH THEY ARE SUPPLIED ARE PROVIDED "AS IS". TDG EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, COURSE OF CONDUCT, AND USAGE OF TRADE. IT IS UNDERSTOOD THAT TDG OBTAINS DATA INCLUDED IN THE PRODUCTS FROM THIRD PARTIES, INCLUDING GOVERNMENT AGENCIES, AND THAT TDG IS UNDER NO OBLIGATION TO CONTINUE THE DEVELOPMENT OF ANY OF THE PRODUCTS OR TO CORRECT ANY ERROR, OMISSION OR MALFUNCTION THEREIN. NEITHER TDG NOR ANY OF ITS SALES REPRESENTATIVES SHALL BE OBLIGATED TO UPDATE OR SUPPORT THE PRODUCTS.

TDG DISCLAIMS ANY LIABILITY FOR ALL, IF ANY, ERRORS AND OMISSIONS IN THE PRODUCTS. IN NO EVENT SHALL TDG BE LIABLE FOR ANY LOST PROFIT, INCIDENTAL, SPECIAL, PUNITIVE AND/OR CONSEQUENTIAL DAMAGES, WHETHER ARISING FROM CONTRACT OR NEGLIGENCE, EVEN IF TDG OR ITS SALES REPRESENTATIVE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. LICENSEE'S SOLE REMEDY REGARDING DEFECTIVE PRODUCTS SHALL BE REPLACEMENT OF THE MEDIA AND PRODUCTS IN QUESTION WITH TDG'S MOST SIMILAR CURRENT OFFERING. IN NO EVENT SHALL TDG BE LIABLE FOR ANY AMOUNTS IN EXCESS OF THE AMOUNTS PAID BY LICENSEE TO OR FOR TDG PURSUANT TO THIS AGREEMENT.

THE PARTIES ACKNOWLEDGE THAT EACH OF THE PROVISIONS OF THIS AGREEMENT, INCLUDING WITHOUT LIMITATION THE PAYMENT PROVISIONS HEREOF, WERE BASED, IN PART, ON THE PROVISIONS OF THIS SECTION 10, AND THAT EACH PARTY FULLY UNDERSTANDS AND ACCEPTS THE OBLIGATIONS AND LIMITATIONS DESCRIBED IN THIS SECTION 10, WHICH SHALL SURVIVE THE TERMINATION, FOR ANY REASON, OF THIS AGREEMENT.

11. **Remedies.** It is acknowledged by Licensee that the Products are unique and TDG's remedy at law for a breach of this Agreement by Licensee will be inadequate. Therefore, if Licensee fails to adhere to the terms and conditions of this Agreement, TDG will be entitled to obtain injunctive relief. This Section shall in no way limit any other remedies to which TDG may be entitled as a result of such breach by Licensee. If Licensee breaches this Agreement, then Licensee agrees to indemnify and hold TDG harmless from (i) any and all resulting claims of liability of TDG to third parties, and (ii) any other damages TDG may incur. In any dispute regarding this Agreement, the prevailing party shall be entitled to recover its attorneys' fees and related costs in addition to other remedies.

12. **General Provisions.** Licensee acknowledges and agrees that this Agreement, together with all related Pricing Schedules, is the complete and exclusive statement of the agreement between the parties, which supersede and merge all prior proposals, negotiations and understandings and all other agreements, oral or written, between the parties relating to the subject matter hereof. Any contrary provision in any purchase order or other communication by Licensee is expressly rejected. No sales representative of TDG or other person has any authority to make any warranty or representation to Licensee or any other person as to the accuracy, completeness or other condition of any of the Products, to modify this Agreement in any manner, to assume or create any obligation or responsibility, whether express or implied, on behalf of TDG, or to otherwise bind TDG in any manner. Licensee shall not assign or otherwise transfer the Products or this Agreement to anyone, including any parent, subsidiary, affiliated entity or third party, or as part of the sale of all or any portion of its business, or pursuant to any merger, consolidation or reorganization, without TDG's prior written consent. Except that TDG may unilaterally create or amend any Pricing Schedule, including modification of prices for the Products or maintenance, prospectively, any waiver, amendment, or modification of any provision hereof shall not be effective unless made in writing and duly signed by both Licensee and TDG. No delay in exercising, no course of dealing with respect to, and no partial exercise of any right or remedy hereunder shall constitute a waiver of such right or remedy, or any other right or remedy, or future exercise thereof. If any provision hereof is invalid, illegal or unenforceable under any applicable statute or rule of law, it is to that extent to be deemed omitted. The remainder of the Agreement shall be valid and enforceable to the maximum extent possible. The undersigned individual signing this Agreement on behalf of Licensee represents and warrants to TDG that he or she is duly authorized to execute the Agreement on behalf of Licensee, and that this Agreement is the valid, binding and enforceable obligation of Licensee in accordance with its terms. This Agreement shall be governed by the laws, other than the choice of law rules, of the State of Texas. Licensee hereby consents for all purposes and to the fullest extent possible to the jurisdiction of the courts of the State of Texas with regard to any matter relating to the interpretation or enforcement of this Agreement, and waives any objection it might otherwise have that any such forum is inappropriate or inconvenient.

The undersigned acknowledges as and on behalf of Licensee that Licensee has read and understands this Agreement, has received full and adequate consideration for it, and that Licensee agrees to be bound by its terms. In witness whereof, this Agreement is executed.

LICENSEE:

_____
(Type Licensee's name)

By _____
(Authorized signature)

_____
(Type name and title)

Date _____

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement (the "Agreement") is by and between SoftSearch Holdings, Inc. ("SoftSearch"), a corporation organized under the laws of the State of Texas, with its principal offices located at Abilene, Texas, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

*Whereas*, SoftSearch and GeoQuest International Holdings, Inc. entered into an agreement, dated _____, pursuant to which SoftSearch's wholly-owned subsidiary Dwight's Energydata, Inc. ("Dwights") and GeoQuest's wholly-owned subsidiary Petroleum Information Corporation will merge their assets (the "Acquisition"); and

*Whereas*, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission; and

*Whereas*, The Commission has reason to believe that the agreement would violate Section 5 of the Federal Trade Commission Act, and that, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, statutes enforced by the Commission; and

*Whereas*, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), the Commission must place it on the public record for a period of at least sixty days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

*Whereas*, the Commission is concerned that if an agreement is not reached preserving the Specified Data (as defined in the Agreement Containing Consent Order) during the period prior to the time that the Consent Order becomes final, divestiture of said data to an possible in any proceeding challenging the legality of the Acquisition in the event that the Consent Order does not become final; and

*Whereas*, the action of SoftSearch in entering into this Agreement shall in no way be construed as an admission by SoftSearch that the

Acquisition violates the statutes as alleged in the draft complaint attached hereto; and

*Whereas*, SoftSearch understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

*Now therefore*, in consideration of the Commission's agreement that, unless it determines to reject the Consent Order, it will not seek further relief from the Parties with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order annexed hereto, and to seek the divestiture of such assets to be preserved under this Agreement as may be required to maintain the level of competition that existed prior to the Acquisition, the Parties agree as follows:

1. SoftSearch agrees to execute, and upon its issuance to be bound by, the attached Consent Order.

2. SoftSearch agrees that from the date this Agreement is accepted by the Commission until the earliest of the dates listed in subparagraphs (a) and (b) it will comply with the provisions of this Agreement.

(a) The date the Consent Order becomes final; or

(b) Three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's rules.

3. SoftSearch shall maintain and update the Specified Data; preserve its viability and marketability, and prevent its destruction, removal, wasting, deterioration or impairment of any kind.

4. If the Commission seeks in any proceeding with respect to the Acquisition to obtain injunctive or equitable relief, SoftSearch shall not raise an objection based upon the fact that the Commission has permitted the Acquisition to be consummated. SoftSearch also waives all rights to contest the validity of this Agreement.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to SoftSearch made to its principal office, SoftSearch shall permit any duly authorized representative of the Commission:

(a) Access during the office hours of SoftSearch or Dwights, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in possession or under the control of SoftSearch relating to compliance with the Agreement; and

(b) Upon five (5) days' written notice to SoftSearch or Dwights and without restraint or interference from it, to interview officers or employees of SoftSearch or Dwights, who may have counsel present, regarding any such matters.

6. The Agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

# BRUNO'S, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FAIR CREDIT REPORTING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3760. Complaint, July 29, 1997--Decision, July 29, 1997*

This consent order requires, among other things, the Alabama-based grocery chain to comply with the provisions of the Fair Credit Reporting Act requiring the consumers to be notified when they are denied credit, insurance or a job based in whole or in part on information in their credit report and requiring the denying company to provide the name and address of the consumer reporting agency that supplied the report.

## *Appearances*

For the Commission: *Tom Carter* and *William D. Griggs*.

For the respondent: *Mark Taliaserro, Burr & Forman,* Birmingham, AL.

## COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Bruno's, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

### DEFINITIONS

For the purposes of this complaint, the following definitions are applicable. The terms *"consumer," "consumer report,"* and *"consumer reporting agency"* shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d) and 1681a(f).

PARAGRAPH 1. Respondent Bruno's, Inc. is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Alabama, with its office and principal place of business located at 800 Lakeshore Parkway, Birmingham, Alabama.

PAR. 2. Respondent, in the ordinary course and conduct of its business, uses information in consumer reports obtained from consumer reporting agencies in the consideration, acceptance, and denial of applicants for employment with respondent.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent, in the ordinary course and conduct of its business, has denied applications or rescinded offers for employment with respondent based in whole or in part on information supplied by a consumer reporting agency, but has failed to advise consumers that the information so supplied contributed to the adverse action taken on their applications or offers for employment, and has failed to advise consumers of the name and address of the consumer reporting agency that supplied the information.

PAR. 5. By and through the practices described in paragraph four, respondent has violated the provisions of Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681m(a).

PAR. 6. By its aforesaid failure to comply with Section 615(a) of the Fair Credit Reporting Act and pursuant to Section 621(a) thereof, respondent has engaged in unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 615(a) of the Fair Credit Reporting Act and Section 5(a) of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Bruno's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 800 Lakeshore Parkway, Birmingham, Alabama.

2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the terms "consumer," "consumer report," and "consumer reporting agency" shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d), and 1681a(f).

I.

*It is ordered*, That respondent Bruno's, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any application for employment, do forthwith cease and desist from failing, whenever employment is denied either wholly or partly because of information contained in a consumer report from a consumer reporting agency, to disclose to the

applicant for employment at the time such adverse action is communicated to the applicant (a) that the adverse action was based wholly or partly on information contained in such a report and (b) the name and address of the consumer reporting agency making the report. Respondent shall not be held liable for a violation of Section 615(a) of the Fair Credit Reporting Act if it shows by a preponderance of the evidence that at the time of the alleged violation it maintained reasonable procedures to assure compliance with Section 615(a) of the Fair Credit Reporting Act.

II.

*It is further ordered*, That respondent, and its successors and assigns, shall for at least five (5) years from the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, documents demonstrating compliance with the requirements of Part I of this order, such documents to include, but not be limited to, all employment evaluation criteria relating to consumer reports, instructions given to employees regarding compliance with the provisions of this order, all written notices or a written or electronically stored notation of the description of the form of notice and date such notice was provided to applicants pursuant to any provisions of this order, and the complete application files for all applicants for whom consumer reports were obtained for whom offers of employment are not made or have been withheld, withdrawn, or rescinded based, in whole or in part, on information contained in a consumer report.

III.

*It is further ordered*, That respondent shall deliver a copy of this order at least once per year for a period of five (5) years from the date of issuance of this order, to all persons responsible for the respondent's compliance with Section 615(a) of the Fair Credit Reporting Act.

IV.

*It is further ordered*, That respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed

change in the corporate structure of respondent such as dissolution, assignment, or sale resulting in the emergence of a successor operation, the creation or dissolution of subsidiaries or divisions, or any other change in the corporation which may affect compliance obligations arising out of the order.

V.

*It is further ordered*, That respondent shall, within sixty (60) days of service of this order, file with the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VI.

*It is further ordered*, That this order will terminate on July 29, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

# CADENCE DESIGN SYSTEMS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3761. Complaint, Aug. 7, 1997--Decision, Aug. 7, 1997*

This consent order requires, among other things, the California corporation to allow developers of commercial integrated circuit routing tools to participate in the Cadence "Connection Program" and any other Cadence independent software interface programs that enable independent software developers to develop and sell interfaces to Cadence layout tools and environments. The consent order requires Cadence to offer participation to independent software developers on terms no less favorable than those applicable to any other participant in the program, which currently has approximately 100 partners.

## *Appearances*

For the Commission: *Robert N. Cook* and *Joseph Krauss.*

For the respondent: *Christopher O.B. Wright, Cooley Godward LLP,* Palo Alto, CA.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Cadence Design Systems, Inc. proposes to merge with Cooper & Chyan Technology, Inc. in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

### I. THE RESPONDENT

1. Respondent Cadence Design Systems, Inc. ("Cadence") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2655 Seely Road, San Jose, California. Cadence has annual worldwide sales of approximately

$741 million, nearly all of which is attributable to electronic design automation products and services, and more than $70 million of which is attributable to sales of integrated circuit layout environments.

2. At all times relevant herein, the respondent has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, the respondent has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

## II. THE PROPOSED MERGER

3. Cooper and Chyan Technology, Inc. ("CCT") is a corporation organized, existing, and doing business under the laws of Delaware. CCT has annual worldwide sales of approximately $37.6 million, of which approximately $13 million is attributable to integrated circuit routing tools and related services, with the balance attributable to printed circuit board routing tools and related services.

4. Pursuant to an Agreement and Plan of Merger and Reorganization dated October 28, 1996, Cadence plans to acquire control of CCT by exchanging Cadence voting securities for the outstanding voting securities of CCT in a transaction valued at more than $400 million (the "Proposed Merger").

## III. THE RELEVANT MARKETS

5. Research, development, and sale of constraint-driven, shape-based integrated circuit routing tools constitute one relevant line of commerce within which to analyze the competitive effects of the Proposed Merger. A constraint-driven, shape-based integrated circuit routing tool is software used to automate the determination of the connections between the electronic components within an integrated circuit. An integrated circuit is a complex electronic circuit that consists of as many as five million or more miniature electronic components -- such as transistors, resistors, capacitors, and diodes -- on a piece of semiconductor material smaller than a postage stamp.

6. There are no acceptable substitutes for constraint-driven, shape based integrated circuit routing tools. Routing tools based on other technology cannot accommodate unique problems that arise at deep

submicron scales of integrated circuit design (less than .35 micron). Furthermore, at deep submicron scales of design, it is not commercially feasible to route integrated circuit designs without automation. Given the sheer complexity and density of deep submicron integrated circuit designs, as well as the intense time-to-market pressures faced by semiconductor companies in today's fast-paced electronics industry, hand routing is not an alternative for the timely and accurate design of integrated circuits.

7. Integrated circuit layout environments also constitute a relevant line of commerce in which to analyze the competitive effects of the Proposed Merger. Integrated circuit layout environments are software infrastructures within which integrated circuit designers access integrated circuit layout tools, including constraint-driven, shape-based routing tools. Integrated circuit layout tools and integrated circuit layout environments are used during the physical design stage of the integrated circuit design process. The physical design stage is distinct from, and occurs after, the logical design stage of the integrated circuit design process.

8. The relevant geographic market within which to analyze the Proposed Merger is worldwide.

## IV. CONCENTRATION

9. CCT is currently the only firm with a commercially viable constraint-driven, shape-based integrated circuit routing tool. At least one other firm with constraint-driven, shape-based routing technology is in the process of developing a constraint-driven, shape-based integrated circuit routing tool.

10. Cadence is the dominant supplier of integrated circuit layout environments. Cadence's leading competitor in the supply of integrated circuit layout environments is the Avant! Corporation. Avant! and several of its top executives have been charged criminally with conspiracy and theft of trade secrets from Cadence.

## V. ENTRY CONDITIONS

11. There are substantial barriers to entry in the market for constraint-driven, shape-based integrated circuit routing tools. Constraint-driven, shape-based integrated circuit routing tools are technologically complex and difficult to develop. *De novo* entry takes approximately two to three and a half years for a company that

already possesses certain underlying core technology that can be used to develop a constraint-driven, shape-based integrated circuit router (such as shape-based routing technology for printed circuit boards). Entry is likely to take even longer for a company that does not possess such technology.

12. In order to achieve the necessary compatibility between the integrated circuit layout tools that they use, integrated circuit designers select integrated circuit layout tools that have interfaces to a common integrated circuit layout environment.

13. Since Cadence is the dominant supplier of integrated circuit layout environments, a constraint-driven, shape-based integrated circuit routing tool that lacks an interface into a Cadence integrated circuit layout environment is less likely to be selected by integrated circuit designers than a constraint-driven, shape-based integrated circuit routing tool that possesses an interface into a Cadence integrated circuit layout environment.

14. An integrated circuit layout environment is not likely to be selected by integrated circuit designers unless a full set of compatible integrated circuit layout tools is available. A full set of integrated circuit layout tools includes at least placement, routing, and analysis and verification tools, each of which must be able to interface into the integrated circuit layout environment that the integrated circuit designer has selected.

## VI. EFFECTS OF THE PROPOSED MERGER ON COMPETITION

15. It is in Cadence's interest to make available to users of a Cadence integrated circuit layout environment a complete a set of integrated circuit layout tools, because to do so makes the Cadence integrated circuit layout environment more valuable to integrated circuit designers. Cadence historically has provided access to Cadence integrated circuit layout environments to suppliers of complementary integrated circuit layout tools that Cadence does not supply.

16. Cadence does not, however, have incentives to provide access to a Cadence integrated circuit layout environment to suppliers of integrated circuit layout tools that compete with Cadence products. Cadence historically has been reluctant to provide access to Cadence integrated circuit layout environments to suppliers of integrated circuit layout tools that compete with Cadence products.

17. Prior to the Proposed Merger, Cadence did not have a commercially viable constraint-driven, shape-based integrated circuit routing tool. As a result of the Proposed Merger, Cadence will own the only currently available commercially viable constraint-driven, shape-based integrated circuit routing tool. For this reason, the Proposed Merger will make Cadence less likely to permit potential suppliers of competing constraint-driven, shape-based integrated circuit routing tools to obtain access to Cadence integrated circuit layout environments.

18. Without access to Cadence integrated circuit layout environments, developers are less likely to gain successful entry into the market for constraint-driven, shape-based integrated circuit routing tools.

19. The Proposed Merger will make it more likely that successful entry into the constraint-driven, shape-based integrated circuit routing tool market would require simultaneous entry into the market for integrated circuit layout environments. This need for dual-level entry will decrease the likelihood of entry into the market for constraint-driven, shape-based integrated circuit routing tools.

20. The Proposed Merger may substantially lessen competition or tend to create a monopoly in the market for constraint-driven, shape-based integrated circuit routing tools. The Proposed Merger may, among other things, lead to higher prices, reduced service, and less innovation.

## VII. VIOLATIONS CHARGED

21. The Proposed Merger of Cadence Design Systems, Inc. and Cooper & Chyan Technology, Inc., described in paragraph four, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Azcuenaga concurring in part and dissenting in part, and Commissioner Starek dissenting.

## DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Cadence Design Systems, Inc. ("Cadence") of Cooper & Chyan Technology, Inc. ("CCT") and having been furnished thereafter with a copy of a draft

of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Cadence is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2655 Seely Road, San Jose, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

*It is ordered*, That, as used in this order, the following definitions shall apply:

A. *"Cadence"* means Cadence Design Systems, Inc., its directors, officers, employees, agents and representatives, predecessors,

successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Cadence Design Systems, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. *"CCT"* means Cooper & Chyan Technology, Inc., a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1601 South De Anza Boulevard, Cupertino, California.

C. *"Respondent"* means Cadence.

D. *"Commission"* means the Federal Trade Commission.

E. *"Acquisition"* means the acquisition by Cadence of CCT.

F. *"Independent Software Interface Programs"* means respondent's Connections Program™, any successor program thereto, or other licensing program, promotional program or other arrangement by which respondent enables independent software developers to provide interfaces to respondent's Integrated Circuit Design Tools (including, *e.g.*, licenses to the SKILL Programming Language, the SKILL Development Environment, the Virtuoso Layout Editor, and other intellectual property and documentation made available through such programs).

G. *"Integrated Circuit Design Tool"* means electronic design automation software for integrated circuit design.

H. *"Integrated Circuit Routing Tool"* means an Integrated Circuit Design Tool for the automated routing of connections between electronic components within an integrated circuit.

I. *"Commercial Integrated Circuit Routing Tool"* means an Integrated Circuit Routing Tool marketed for sale or intended by the developer for use other than solely for the developer's internal use.

II.

*It is further ordered*, That:

A. Respondent shall permit developers of Commercial Integrated Circuit Routing Tools to participate in Independent Software Interface Programs. The terms by which developers of Commercial Integrated Circuit Routing Tools participate in respondent's Independent Software Interface Programs shall be no less favorable than the terms applicable to any other participants in respondent's Independent Software Interface Programs.

B. The purpose of this paragraph II is to enable independent software developers to develop and sell Integrated Circuit Routing Tools for use in conjunction with respondent's Integrated Circuit Design Tools, in competition with Integrated Circuit Routing Tools offered by respondent, and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

III.

*It is further ordered*, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission, directly or indirectly:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in the development or sale of Integrated Circuit Routing Tools in the United States within the year preceding such acquisition; provided, however, that an acquisition of such stock, share capital, equity or other interest will be exempt from the requirements of this paragraph if it is solely for the purpose of investment and respondent will hold no more than ten (10) percent of the shares of any class of security; or

B. Acquire any assets used or previously used (and still suitable for use) in the development or sale of Integrated Circuit Routing Tools in the United States; provided, however, that such an acquisition will be exempt from the requirements of this paragraph if the purchase price is less than $5,000,000 (five million dollars).

The prior notifications required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared, transmitted and kept confidential in accordance with the requirements of that part, except that: no filing fee will be required for any such notification; notification shall be filed with the Secretary of the Commission and a copy shall be delivered to the Bureau of Competition; notification need not be made to the United States Department of Justice; and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to the consummation of any such transaction (hereinafter referred to as the "initial waiting period"). If, within the initial waiting

period, the Commission or its staff makes a written request for additional information and documentary material, respondent shall not consummate the transaction until at least twenty (20) days after complying with such request for additional information and documentary material. Early termination of the waiting periods in this paragraph may, where appropriate, be granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

IV.

*It is further ordered*, That, within sixty (60) days after the date this order becomes final, respondent shall submit to the Commission a verified written report setting forth in detail a full description of the manner and form in which it intends to comply, is complying, and has complied with paragraph II of this order.

V.

*It is further ordered*, That, one year from the date this order becomes final, annually thereafter for the next nine (9) years, and at other times as the Commission may require, respondent shall file with the Commission verified written reports setting forth in detail the manner and form in which respondent has complied and is complying with this order.

VI.

*It is further ordered*, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

VII.

*It is further ordered*, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VIII.

*It is further ordered*, That this order shall terminate on August 7, 2007.

Commissioner Azcuenaga concurring in part and dissenting in part, and Commissioner Starek dissenting.*

INTERIM AGREEMENT

This Interim Agreement is by and between Cadence Design Systems, Inc., a corporation organized and existing under the laws of the State of Delaware ("Cadence"), and the Federal Trade Commission, an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (the "Commission").

PREMISES

*Whereas*, Cadence has proposed to acquire all of the voting securities of Cooper & Chyan Technology, Inc. ("CCT") pursuant to the Agreement and Plan of Merger and Reorganization by and between Cadence and CCT, dated October 28, 1996 ("the proposed Merger");

*Whereas*, the Commission is now investigating the proposed Merger to determine if it would violate any of the statutes the Commission enforces;

*Whereas*, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement") in this matter, the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in

* Prior to leaving the Commission, former Commissioner Varney registered a vote in the affirmative for issuing the complaint and the decision & order in this matter.

disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules;

*Whereas*, the Commission is concerned that if an understanding is not reached during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm;

*Whereas*, the entering into this Interim Agreement by Cadence shall in no way be construed as an admission by Cadence that the proposed Merger constitutes a violation of any statute; and

*Whereas*, Cadence understands that no act or transaction contemplated by this Interim Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Interim Agreement.

*Now, therefore*, Cadences agrees, upon the understanding that the Commission has not yet determined whether the proposed Merger will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Cadence agrees to execute the Consent Agreement and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Cadence signs the Consent Agreement.

2. Cadence agrees that, from the date Cadence signs the Consent Agreement until the first of the dates listed in subparagraphs 2.a and 2.b, it will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the order is final.

3. Cadence waives all rights to contest the validity of this Interim Agreement.

4. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege, and upon written request, and on reasonable notice, Cadence shall permit any duly authorized representative or representatives of the Commission:

a. Access, during the office hours of Cadence and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Cadence relating to compliance with this Interim Agreement; and

b. Upon five (5) days' notice to Cadence and without restraint or interference from them, to interview officers, directors, or employees of Cadence who may have counsel present, regarding any such matters.

5. This Interim Agreement shall not be binding until accepted by the Commission.

## STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONER JANET D. STEIGER[1]

The consent agreement negotiated in this matter, which the Commission has issued today, eases competitive concerns raised by Cadence Design Systems, Inc.'s ("Cadence") acquisition of Cooper & Chyan Technology, Inc. ("CCT").

The Commission's complaint alleges that Cadence is the dominant supplier of complete software "layout environments" for the physical design of integrated circuits, or "chips," the postage-stamp sized electronic components used in devices as diverse as personal computers and kitchen appliances. CCT sells a software tool, called a "router," that works within a layout environment and allows users to plot the connections among the millions of components within an integrated circuit. The complaint alleges that CCT is the only firm to have developed a "constraint-driven, shape-based" router, state-of-the-art technology that is expected to solve the next generation of problems that will face integrated circuit producers designing ever more powerful chips.

The Commission's complaint alleges a well-established vertical theory of competitive harm, laid out in the 1984 Merger Guidelines.[2]

[1] Commissioner Varney participated in this matter and joined Chairman Pitofsky and Commissioner Steiger in an earlier version of this statement, which was issued when the matter was accepted by the Commission for public comment. Commissioner Varney, however, left the Commission before this statement was finalized.

[2] *See* U.S. Department of Justice Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,103 (June 14, 1984) (hereinafter "1984 Merger Guidelines"). When the agencies issued the 1992 Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 7, 1992), they explained that "[s]pecific guidance on non-horizontal mergers is provided in...[the] 1984 Merger Guidelines." U.S. Department of Justice and Federal Trade Commission Statement Accompanying Release of Revised Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 2, 1992). *See generally* Herbert Hovenkamp, Federal Antitrust Policy Sections 9.4, 9.5 (1994) (suggesting that vertical mergers may create barriers to entry when one of the parties is a monopolist or near-monopolist).

The Guidelines explain that a vertical merger can produce horizontal anticompetitive effects by making competitive entry less likely if (1) as a result of the merger, there is a need for simultaneous entry into two or more markets and (2) such simultaneous entry would make entry into the single market less likely to occur.[3] While the dissenting Commissioners may take issue in this case with the "dual-level entry" theory of vertical mergers that the 1984 Guidelines articulate, the available evidence suggests that the Cadence/CCT merger, which combines Cadence's dominant position in integrated circuit layout environments with CCT's current monopolistic position in constraint-driven, shape-based integrated circuit routers, presents a straightforward case of anticompetitive effects caused by vertical integration. We believe that this type of competitive harm merits our attention.[4]

When considering the effects of mergers in dynamic, innovative high-tech markets, such as those present here, it is particularly important to investigate whether such mergers will create barriers to entry. New entrants often bring innovation to the market, and the threat of entry leads incumbents to innovate. Therefore, we must be vigilant to preserve opportunities for entry.

As the attached Analysis to Aid Public Comment explains, unless a would-be supplier of routing tools had the ability to develop an interface to the Cadence integrated circuit layout environment, it would not be able to market its routing product effectively to the vast majority of potential customers which use the Cadence layout environment.[5] Without an expectation that it could design software compatible with Cadence's installed base, a would-be entrant might well decide not to compete.[6]

After the Cadence/CCT merger, Cadence would have had an incentive to impede attempts by companies developing routing

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[3] *See* 1984 Merger Guidelines Section 4.21.

[4] Contrary to Commissioner Starek's assertions that enforcement action here, in the context of a merger, leads logically to enforcement action against internal vertical expansion, *see* Dissenting Statement of Commissioner Roscoe B. Starek, III at n.8 & accompanying text, such unilateral action has been known to present a completely different set of questions under the antitrust laws for more than one hundred years.

[5] Not only is Cadence the dominant layout environment, but its competitors are in a state of disarray. For example, Cadence's most significant competitor, Avant! Corporation, and several of its top executives have recently been charged with theft of trade secrets from Cadence.

[6] CCT decided that it was so important to gain access to Cadence's layout environment that when Cadence refused to allow the IC Craftsman product (CCT's constraint-driven, shape-based router technology) to interface with the Cadence layout program through the "Connections" Program, CCT induced a third party that was a Connections partner to write an interface to the Connections Program for IC Craftsman without Cadence's knowledge. Cadence thereafter sought to impede CCT's attempts to gain access to the Cadence integrated circuit layout environment by suing CCT.

technology competitive with CCT's constraint-driven, shape-based router technology, IC Craftsman, to gain access to the Cadence integrated circuit layout environment. Following the merger, successful entry into the routing tool market is more likely to require simultaneous entry into the market for integrated circuit layout environments. Without a consent order that mandates access to Cadence's layout environment, and thus lowers the barriers to entry in the market, a combined Cadence/CCT will face less competitive pressure to innovate or to price aggressively. Thus, competition would likely be reduced as a result of the acquisition.

The remedy in this matter preserves opportunities for new entrants with integrated circuit routers competitive with IC Craftsman by allowing them to interface with Cadence's layout environments on the same terms as developers of complementary design tools.[7] Specifically, the order requires Cadence to allow independent commercial router developers to build interfaces between their design tools and the Cadence layout environment through Cadence's "Connections Program." The Connections Program is in place now and has more than one hundred participants who have all entered a standard form contract with Cadence.

The separate statements by Commissioners Azcuenaga and Starek question this enforcement action. We respectfully disagree.

First, Commissioner Azcuenaga argues that the Commission should have brought an action based upon a horizontal theory of competitive harm. We certainly agree that horizontal competitive concerns deserve our close attention and recognize that horizontal remedies often cure vertical problems. If we had credible support for the theory that the merger would combine actual or potential horizontal competitors and would substantially lessen competition in an integrated circuit routing market or an innovation market for integrated circuit routers, we would not hesitate to advance that case. But after a thorough investigation by Commission staff, we did not find sufficient evidence to conclude that, absent the acquisition, Cadence would have been able to enter the market for constraint-driven, shape-based integrated circuit routers successfully in the foreseeable future. On the contrary, the staff investigation indicated that Cadence's efforts to develop such technology had

[7] At the same time, the order preserves any efficiencies of vertical integration resulting from the merger, which may benefit customers.

failed, and therefore there is not sufficient evidence to establish that entry would have occurred but for the acquisition.[8]

The dissenting statements fail to give full weight to all the incentives at work in the vertical case. It is true that Cadence would be motivated by the entry of new, promising routing technology to allow an interface to its layout environment to sell more of its complementary products. And absent the merger, that would be its only incentive. But with the merger, Cadence clearly also has an incentive to prevent loss of sales in its competing products. And while these two incentives may compete as a theoretical matter, the evidence in this case indicated that Cadence has acted historically according to the latter incentive. There is some reason to believe that Cadence in the past has thwarted attempts by firms offering potentially competitive technology to develop interfaces to its layout environment (including at one point, CCT). Now that it has a satisfactory router to offer its customers, there is no reason to think that absent the consent order, Cadence would treat developers of routers that would compete with IC Craftsman any differently than it once treated CCT.

Commissioner Azcuenaga also suggests that the consent order is unnecessary because a company developing a router to compete with IC Craftsman could proceed, as CCT did, without an interface to Cadence's design layout environment. The evidence showed, however, that CCT's management thought that ensuring compatibility with Cadence's layout environment was critical and that marketing without that compatibility, which it had done, was not sufficient.[9] It took the extreme measure of inducing a third party to write software for CCT to interface IC Craftsman with the Cadence layout environment without Cadence's knowledge. Moreover, despite CCT's success in developing a routing program, its sales of IC Craftsman were quite modest before it obtained an authorized interface with the Cadence environment.[10]

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[8] We agree with Commissioner Azcuenaga that claims that a technology has failed made after parties agree to a transaction must be discounted because the incentive to justify the transaction are strong. Rather than rely on such evidence in reaching our conclusion that the technology had failed, we rely upon confidential information from potential customers that tested Cadence's products under development.

[9] Interfacing with another firm's design layout environment is also not a feasible alternative because of Cadence's dominant position in the market. Without hope of marketing to the vast majority of customers, developers of an alternative router have minimal incentives to compete. In addition, the competitive significance of Cadence's few competitors is questionable.

[10] CCT obtained permission to interface with the Cadence layout environment in the fall of 1996, and CCT's sales of IC Craftsman for all of 1996 were only $13 million. "Me too" products or products offering incremental innovation rather than the revolutionary breakthrough of IC Craftsman would have an even more difficult time entering.

Commissioner Azcuenaga is further concerned that mandating access to the Connections Program for developers of routing software on terms as favorable as for other Connections participants might have unintended consequences. In particular, she is concerned that the order may prompt Cadence to charge higher prices to all Connections partners. But the Connections Program is an existing program with over one hundred members, and Cadence would have significant logistical difficulties, and would risk injuring its reputation, if it suddenly altered the terms of the program. Also, Cadence has good reasons for having so many Connections partners--they offer Cadence customers valuable tools, most of which do not compete with Cadence products. It seems unlikely that Cadence would be motivated to make the Connections Program less appealing to those partners.

Both Commissioners Azcuenaga and Starek suggest that the remedy may be difficult to enforce. Any time this Commission enters an order, it takes upon itself the burden of enforcing the order, which requires use of our scarce resources. However, we think the order, which simply requires Cadence to allow competitors and potential competitors developing routing technology to participate in independent software interface programs on terms no less favorable than the terms applicable to any other participants in such programs, is a workable approach.[11] Connections partners all sign the same standard-form contract and there has been a consistent pattern of conduct with respect to the program to use as a baseline for future comparisons. Moreover, the Commission has had experience with such non-discrimination provisions, and can rely on respondent's compliance reports required under the order as well as complaints from independent software developers to ensure compliance with the consent order. We think the dissenting Commissioners' scenarios about intractable compliance issues are unfounded.

In sum, we believe that the consent order will preserve competition in the market for cutting-edge router technology by reducing barriers to entry.

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[11] The language of the consent order is clear in requiring that terms for routing companies be no less favorable than for any other participant in the Connections Program. Thus, we do not understand Commissioner Starek's conclusion that the order could be interpreted to require routing companies to pay a "fee no higher than the highest fee." And as his own dissent acknowledges, if the order could be interpreted to allow Cadence to terminate router developers from the Connections Program after thirty days, the order would be meaningless.

ATTACHMENT TO STATEMENT OF CHAIRMAN PITOFSKY AND COMMISSIONER STEIGER

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Agreement") from Cadence Design Systems, Inc. ("proposed respondent"). The proposed order is designed to remedy anticompetitive effects stemming from Cadence's proposed acquisition of Cooper & Chyan Technology ("CCT"). On October 28, 1996, Cadence and CCT entered into an Agreement and Plan of Merger and Reorganization whereby Cadence will acquire 100 percent of the issued and outstanding shares of CCT voting securities in exchange for shares of Cadence voting securities valued at more than $400 million (the "Proposed Merger").

The Commission has reason to believe that the Proposed Merger may substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, unless an effective remedy eliminates likely anticompetitive effects. The Agreement Containing Consent Order would, if finally accepted by the Commission, settle charges that Cadence's acquisition of CCT may substantially lessen competition or tend to create a monopoly in the research, development, and sale of constraint-driven, shape-based integrated circuit routing tools.

The proposed order has been placed on the public record for sixty (60) days. The Commission invites the submission of comments by interested persons, and comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the Agreement, as well as any comments received, and will decide whether it should withdraw from the Agreement or make final the Agreement's proposed order.

The Proposed Complaint

According to the Commission's proposed complaint, Cadence is a company that sells various electronic design automation products and services, including integrated circuit layout environments. An integrated circuit (more commonly known as a microchip) is a complex electronic circuit that consists of as many as five million or more miniature electronic components on a piece of semiconductor material smaller than a postage stamp. Integrated circuit design

consists of two distinct phases, logical design and physical design. Integrated circuit layout environments, which are used during the physical design phase, are software infrastructures within which integrated circuit designers access integrated circuit layout tools. Approximately $70 million of Cadence's annual worldwide sales of approximately $741 million are attributable to sales of integrated circuit layout environments.

The proposed complaint further alleges that CCT is a company that sells integrated circuit routing tools and related services, which account for approximately $13 million of CCT's annual worldwide sales of approximately $37.6 million. An integrated circuit routing tool, which is a type of integrated circuit layout tool, is software used to automate the determination of the connections between electronic components within an integrated circuit.

According to the Commission's proposed complaint, a relevant line of commerce within which to analyze the competitive effects of the Proposed Merger is the market for the research, development, and sale of constraint-driven, shape-based integrated circuit routing tools. As integrated circuit designs have become smaller, denser, and faster, the routing of the interconnections between components has become an increasingly important phase of the integrated circuit design process. Routing issues are critical at deep submicron scales of integrated circuit design, which are scales of design smaller than .35 micron (a micron is a millionth of an inch). The current state-of-the-art design scale is .35 micron, but in the future, integrated circuit designs will shrink to .25 micron and then .18 micron design scales. At deep submicron scales of integrated circuit design, routing is complicated by "cross talk" and other types of electrical interference, timing concerns, design density, and other problems. A constraint-driven, shape-based integrated circuit routing tool is the only kind of routing tool that can correctly accommodate these unique deep submicron integrated circuit routing issues.

The proposed complaint further alleges that there are no acceptable substitutes for constraint-driven, shape-based integrated circuit routing tools. Routing tools based on other technology cannot accommodate the unique deep submicron integrated circuit routing issues described above and thus cannot route deep submicron integrated circuit designs accurately. Routing inaccuracies create serious performance problems, and correcting these problems causes significant design delays. Nor is it commercially feasible for integrated circuit design engineers to route integrated circuit designs

without automation (*i.e.*, by "pointing and clicking" between each individual component and each other component to which it must be connected, then going back and correcting any interference or other problems that arise as the routing progresses). Given the sheer complexity and density of deep submicron integrated circuit designs, as well as the intense time-to-market pressures faced by semiconductor companies in today's fast-paced electronics industry, hand routing is not an alternative for the timely and accurate design of integrated circuits.

The proposed complaint further alleges that CCT is currently the only firm with a commercially viable constraint-driven, shape-based integrated circuit routing tool, although at least one other firm is in the process of developing a constraint-driven, shape-based integrated circuit routing tool that would compete with CCT's product. The complaint further alleges that Cadence is the dominant supplier of integrated circuit layout environments. The competitive significance of Avant! Corporation, Cadence's leading competitor in the supply of integrated circuit layout environments, is limited by the fact that Avant! has been charged criminally with conspiracy and theft of trade secrets from Cadence. Several top Avant! executives have been charged criminally as well.

The Commission's proposed complaint further alleges that there are high barriers to entry in the market for constraint-driven, shape-based integrated circuit routing tools, which are technologically complex and difficult to develop. *De novo* entry takes approximately two to three and a half years for a company that already possesses certain underlying core technology that can be used to develop a constraint-driven, shape-based integrated circuit router (for example, shape-based routing technology for printed circuit boards). Entry is likely to take even longer for a company that does not already possess such technology.

According to the Commission's proposed complaint, integrated circuit designers achieve the necessary compatibility between integrated circuit layout tools by selecting tools that have interfaces to a common integrated circuit layout environment. As a result, a constraint-driven, shape-based routing tool that lacks an interface into a Cadence integrated circuit layout environment is less likely to be selected by integrated circuit designers than a constraint-driven, shape-based routing tool that possesses such an interface. Similarly, an integrated circuit layout environment is not likely to be selected by

integrated circuit designers unless a full set of compatible integrated circuit design tools is available.

The proposed complaint further alleges that it is in Cadence's interest to make available to users of Cadence integrated circuit layout environments a complete a set of integrated circuit design tools, because to do so makes a Cadence integrated circuit layout environment more valuable to customers. Historically, Cadence has provided access to its integrated circuit layout environments to suppliers of complementary integrated circuit layout tools that Cadence does not supply. Cadence does not, however, have incentives to provide access to its integrated circuit layout environments to suppliers of integrated circuit layout tools that compete with Cadence products. Cadence historically has been reluctant to provide access to its integrated circuit layout environments to suppliers of competing integrated circuit layout tools.

According to the Commission's proposed complaint, prior to the Proposed Merger, Cadence did not have a commercially viable, constraint-driven, shape-based integrated circuit routing tool. As a result of the Proposed Merger, Cadence will own the only currently available commercially viable constraint-driven, shape-based integrated circuit router. Thus, as a result of the Proposed Merger, Cadence will become less likely to permit potential suppliers of competing constraint-driven, shape-based integrated circuit routing tools to obtain access to Cadence integrated circuit layout environments.

The Commission's proposed complaint alleges that, absent access to Cadence integrated circuit layout environments, developers will be less likely to gain successful entry into the market for constraint-driven, shape-based routing tools. The proposed complaint further alleges that the Proposed Merger will make it more likely that successful entry into the constraint-driven, shape-based integrated circuit routing tool market would require simultaneous entry into the market for integrated circuit layout environments. This need for dual-level entry will further decrease the likelihood of entry into the market for constraint-driven, shape-based integrated circuit routing tools.

The Commission's proposed complaint alleges that the Proposed Merger may substantially lessen competition or tend to create a monopoly in the market for constraint-driven, shape-based routing

tools, which, among other things, may lead to higher prices, reduced services, and less innovation.

The Proposed Order

The proposed order would remedy the alleged violations by eliminating a significant impediment to entry in the market for integrated circuit routing tools. The proposed order would require that Cadence permit developers of commercial integrated circuit routing tools to participate in the Cadence Connections Program™, any successor program thereto, or other licensing programs, promotional programs or other arrangements (collectively, "Independent Software Interface Programs") which enable independent software developers to develop and sell interfaces to Cadence integrated circuit layout tools and Cadence integrated circuit layout environments.

The proposed order would require that Cadence allow independent developers of commercial integrated circuit routing tools to participate in Cadence's Independent Software Interface Programs on terms no less favorable than the terms applicable to other participants. Cadence currently has over 100 partners in its Independent Software Interface Programs.

The purpose of these requirements is to ensure that Cadence's acquisition of CCT's constraint-driven, shape-based integrated circuit routing tool does not create incentives for Cadence to prevent competing suppliers of constraint-driven, shape-based integrated circuit routing tools from participating in Cadence's Independent Software Interface Programs; to prevent a need for dual-level entry in the markets for constraint-driven, shape-based integrated circuit routing tools and integrated circuit layout environments; to ensure that independent software developers will continue to invest the resources necessary to develop and sell constraint-driven, shape-based integrated circuit routing tools that would compete with CCT's constraint-driven, shape-based integrated circuit routing tool; and to remedy the lessening of competition as alleged in the Commission's complaint.

In addition, the proposed order would prohibit Cadence from acquiring certain interests in any other concern which, within the year preceding such acquisition, engaged in the development or sale of integrated circuit routing tools in the United States, and also would prohibit Cadence from acquiring any assets used or previously used (and still suitable for use) in the development or sale of integrated circuit routing tools in the United States, without prior notice to the

Commission, for a period of ten (10) years. Absent this prior notice requirement, Cadence might be able to undermine the purposes of the proposed order by acquiring a developer of integrated circuit routing tools without the Commission's knowledge, where such acquisition would not be subject to the reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Cadence and the Commission also have entered into an Interim Agreement whereby Cadence has agreed to be bound by the terms of the proposed order, pending and until the Commission's issuance of the proposed order.

The purpose of this analysis is to facilitate public comment on the proposed order. This analysis is not intended to constitute an official interpretation of the Agreement or the proposed order or in any way to modify the terms of the Agreement or the proposed order.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

The acquisition of Cooper & Chyan Technology, Inc. (Cooper & Chyan), by Cadence Design Systems, Inc. (Cadence), combines the only firm currently marketing a constraint-driven, shape-based integrated circuit routing tool with a firm that was, at least until the acquisition, on the verge of entry into this market. I find reason to believe that the proposed merger would violate Section 7 of the Clayton Act under a horizontal, potential competition theory. On this ground, I support the prior notice provision of paragraph III of the order, which provides a small measure of horizontal relief.[1] I dissent from the allegations in the complaint and the order provisions that address the vertical aspects of the case.

To establish a Section 7 violation based on the actual potential competition theory, the government must show: (1) that the potential entrant "has available feasible means for entering" the relevant market; and (2) that "those means offer a substantial likelihood of ultimately producing deconcentration" of the relevant market. *United States v. Marine Bancorporation*, 418 U.S. 602, 633 (1974). In addressing the first element, courts have looked to whether a firm has

[1] The prior notice provision gives the Commission the opportunity to review a future horizontal acquisition by Cadence of another supplier of integrated circuit routing tools. Although this is a horizontal remedy, the complaint contains no corresponding allegations of liability under a horizontal theory. The remainder of the order addresses the vertical concerns of the majority and does relate to allegations in the complaint.

the capacity, interest and economic incentive to enter.[2] The Commission has adopted the view that "clear proof [is required] that independent entry would have occurred but for the merger or acquisition" and has emphasized the importance of concrete investment plans approved by top management and studies done before or contemporaneously with the acquisition demonstrating plans to enter. *B.A.T. Industries*, 104 FTC 852, 919-20, 926-27 (1984).

It is a close question whether Cadence was a potential entrant or already an entrant in the relevant market.[3] Regardless of the outcome of that question, my review of the confidential file indicates that Cadence's interest and economic incentive to enter the market were clear, even under the strictest legal standard of actual potential competition. In determining whether Cadence had the capacity to enter the relevant market, the Commission should assess the *status quo* before Cadence agreed to acquire Cooper & Chyan. Claims that the technology had failed made after the parties agreed to the transaction should be discounted because the incentives to justify the transaction are strong. To support a conclusion that "Cadence's efforts to develop such technology had failed"[4] before the Cooper and Chyan transaction, one would expect to have pre-transaction evidence, such as an indication that Cadence had stopped spending money on the project, some efforts by Cadence to dispel any notion that customers may have entertained that they should refrain from buying other products pending the arrival of the Cadence product, or an indication that Cadence's management had included the failure of the product in their business plans. I have not seen such evidence.[5]

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[2] *Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 1255, 1268-69 (5th Cir. 1981); *Brunswick Corp.*, 94 FTC 1174, 1269-72 (1979), *aff'd and modified sub. no. Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[3] A firm that can begin to supply a product within one year may be considered a market participant. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 1.32 (1992).

[4] *See* Statement of Chairman Robert Pitofsky and Commissioner Janet D. Steiger at 4.

[5] In response to my discussion of this point, Chairman Pitofsky and Commissioner Steiger assert that they have relied on "confidential information from potential customers that tested Cadence's products under development," for their conclusion that the technology had failed. Statement of Chairman Pitofsky and Commissioner Steiger, note 8. In so stating, they reveal that Cadence had products under development and that the products were sufficiently advanced for customer testing. Since it is pointless to debate confidential information, suffice it to say that I disagree with this assessment of the project, based on my review of the customer information and on the views of Cadence's technology development partners. Preliminary testing is an ordinary part of the product development process. Software developers commonly seek customer reactions in beta testing and use the customer responses to refine their products.

Cadence satisfied the criterion of capacity to enter. As the Commission has observed, "capacity to achieve independent entry successfully is always somewhat speculative,"[6] but Cadence was a technological and marketing leader, and it suffered under no apparent impediment to entry. Even if Cadence did not have a "commercially viable" product at the time of the acquisition, the actual potential competition doctrine applies to firms that have not yet perfected a product and completed all the steps necessary to entry.[7]

The second Marine Bancorporation element appears to be satisfied as well. Before the merger, Cooper & Chyan was the only firm selling a constraint driven, shape-based integrated circuit ("IC") router, and entry by Cadence likely would have produced a significant deconcentration of that market.

The vertical theory of violation alleged in the complaint is that the acquisition of Cooper & Chyan by Cadence will make it more difficult for another firm to introduce a constraint driven, shape-based IC router because such an entrant would need its own IC layout environment to enter the market, and that dual level entry is more difficult. Although this is a recognized theory,[8] I question whether it applies in this case and whether a firm needs to enter both the routing and the environment markets simultaneously.

Cooper & Chyan was successful in developing and marketing its routing program before it gained access to Cadence's environment. In a separate statement, Chairman Pitofsky and Commissioners Varney and Steiger assert that Cooper & Chyan's "sales were modest before the merger announcement." I disagree based on Cooper & Chyan's penetration of the market.[9] Cadence's willingness to pay more that $400 million in stock for Cooper & Chyan also suggests a greater

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[6] *Brunswick Corp.*, note 2 *supra*, 94 FTC at 1269.

[7] Paragraph 17 of the complaint alleges that before the merger, "Cadence did not have a commercially viable constraint-driven, shape-based integrated circuit routing tool."

[8] U.S. Department of Justice Merger Guidelines, Section 4 (June 14, 1984).

[9] The public record demonstrates the success of IC Craftsman (the Cooper & Chyan product) before September 12, 1996, when Cooper & Chyan and Cadence agreed to an interface between their products. In a June 3, 1996 press release, Cooper & Chyan said that it had sold the tool to 24 customers, including such familiar firms as AMD, IBM, SGS Thomson, Sun Microsystems, Fujitsu, Motorola, Northern Telecom and Toshiba. Press Release at http://www.cctech.com/new/press/dacqa.htm. This appears to be a substantial percentage of the universe of potential customers. Cooper & Chyan reported record second quarter earnings and revenues on July 23, 1996, and expressed pleasure at "the continued market acceptance of our IC product line." Press Release at http://www.cctech.com/new/press/q296.htm. The company reported continued improvement during the third quarter, which included the Cadence agreement on September 12, 1996. Press Release at http://www.cctech.com/new/press/q396.htm.

competitive significance than the majority concedes.[10] Cooper & Chyan's record indicates that access to a layout environment is not a precondition to successful entry in the market for constraint drive, shape-based integrated circuit routers. It appears, based on the available information, that dual level entry theory does not apply in this market.

In addition, although Cadence initially denied Cooper & Chyan access to its connections program, it subsequently reversed course and granted the access. This suggests that Cadence capitulated to pressure from customers to grant Cooper & Chyan access and that Cadence has little or no power to deny access to its connections program if granting access is the only way to enable its customers to use a product they want to use. Finally, paragraph II of the order is premised on the allegation in paragraph 16 of the complaint that "Cadence does not, however, have incentives to provide access to a Cadence integrated circuit layout environment to suppliers of integrated circuit layout tools that compete with Cadence products." The incentives appear to be at least as likely to go the other way. If another company develops an innovative, advanced router, one would assume that Cadence would have incentives to welcome the innovative product to its suite of connected design tools, thereby enhancing the suite's utility to customers.

Paragraph II of the order may be counterproductive and may result in substantial enforcement costs for the Commission. Because paragraph II bars Cadence from charging developers of "Commercial Integrated Circuit Routing Tools" a higher access fee than developers of other design tools, one possible, unintended consequence of the order is that Cadence may reduce or eliminate discounting of access fees. In addition, enforcement of the provision of the order requiring Cadence to provide access to the connections program to developers of "Commercial Integrated Circuit Routing Tools" on terms "no less favorable than the terms applicable to any other participants" may embroil the Commission unnecessarily in complex commercial disputes.

I concur in paragraph III of the order and dissent from paragraph II of the order.

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[10] Richard Goering, "$420m deal shifts balance of power in board/IC CAD--Cadence acquiring CCT," EE Times, November 4, 1996.

The majority states that sales of the IC Craftsman were "only $13 million" in 1996. To put that amount in perspective, it should be observed that IC Craftsman was first introduced in the second half of 1995. To put that amount in perspective, it should be observed that IC Craftsman was first introduced in the second half of 1995. Press Release of July 23, 1996 at http://www.cctech.com/new/press/q296.htm.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue the complaint and final consent order against Cadence Design Systems, Inc. ("Cadence"), a supplier of software for the design of integrated circuits ("ICs"). The complaint alleges that the merger of Cadence and Cooper & Chyan Technology, Inc. ("CCT") -- a producer of software complementary to Cadence's -- is likely substantially to lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. To justify the complaint and order, the Commission once again invokes the specter of anticompetitive "foreclosure" as a direct consequence of the transaction. As I have made clear on previous occasions,[1] foreclosure theories are generally unconvincing as a rationale for antitrust enforcement. The current case provides scant basis for revising this conclusion.

The theory of harm presented here is the same as -- and thus shares all of the defects of -- that offered in Silicon Graphics, Inc. ("SGI").[2] In SGI, the Commission alleged that the merger of a computer hardware manufacturer (SGI) and two software vendors (Alias and Wavefront) would result in the post-acquisition "foreclosure" of other independent software suppliers, leading to monopoly prices for graphics software. The Commission claimed that because the acquisition would give SGI its own in-house software producers, SGI no longer would allow unaffiliated software vendors access to its hardware platform.

In the current incarnation of this theory, Cadence is cast in the role of SGI and CCT in the role of the software vendors. The Commission alleges that Cadence no longer will allow independent suppliers of "routing" software -- the type of software sold by CCT -- to write programs that can interface with other IC layout programs in the Cadence suite. To mitigate these supposed anticompetitive incentives, the order requires Cadence to provide independent vendors of routing software access to its "Independent Software Interface Programs" (*e.g.*, to its "Connections Program") on terms "no

[1] *See* Dissenting Statement of Commissioner Roscoe B. Starek, III, in Time Warner Inc., et al., Docket No. C-3709 (consent order, Feb. 3, 1997); Dissenting Statement of Commissioner Roscoe B. Starek, III, in Waterous Company, Inc. and Hale Products, Inc., Docket Nos. C-3693 & C-3694 (consent orders, Nov. 22, 1996); Dissenting Statement of Commissioner Roscoe B. Starek, III, in Silicon Graphics, Inc. (Alias Research, Inc., and Wavefront Technologies, Inc.), Docket No. C-3626 (consent order, Nov. 14, 1995); Remarks of Commissioner Roscoe B. Starek, III, "Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and Beyond," remarks before a conference on "A New Age of Antitrust Enforcement: Antitrust in 1995" (Marina del Rey, California, Feb. 24, 1995).

[2] *Supra* note 1.

less favorable" than the terms offered to other independent software vendors.[3]

The logic of the complaint is fundamentally flawed. Even if we assume *arguendo* -- as the complaint in this case does -- that Cadence is "dominant" in the supply of software components complementary to the router,[4] the fact remains that it has no incentive to restrict the supply of routers. I noted in SGI that "SGI ha[d] strong incentives to induce expanded supply of SGI-compatible software: increasing the supply of compatible software (or of any complementary product) increases the demand for SGI's workstations."[5] The same is true here: the introduction of a lower-priced or higher-quality routing program increases the value of Cadence's "dominant" position in the sale of software complementary to the router, because it increases the demand for Cadence design software, thereby allowing Cadence to increase the price and/or the output of these programs. Despite the assertions of Chairman Pitofsky and Commissioner Steiger to the contrary,[6] this is true whether or not Cadence has vertically integrated

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[3] Order, ¶ II.A.

[4] The anticompetitive theory requires Cadence to have substantial monopoly power: if there were numerous good alternatives to Cadence's suite, other independent vendors of routing software could affiliate with them and there would be no "foreclosure."

[5] Dissenting Statement in SGI, *supra* note 1, at 2. Moreover, as was also true in SGI, the description of the premerger state of competition set forth in the complaint itself tends to exclude the possibility of substantial postmerger foreclosure. In SGI, the complaint alleged that software producers other than Alias and Wavefront were competitively insignificant prior to the merger, and that premerger entry barriers were high. Similarly, the current complaint (¶ 11) alleges that there are substantial premerger barriers to entry into the market for the kind of "router" software that CCT produces. But one cannot find both that the premerger supply elasticity of substitutable software is virtually zero and that the merger would result in the substantial postmerger foreclosure of independent software producers. If entry into constraint-driven, shape-based IC router software is effectively blocked premerger, as the complaint contends, it cannot also be the case that the merger would cause a substantial incremental reduction in entry opportunities.

[6] Chairman Pitofsky and Commissioner Steiger assert that "Cadence clearly also has an incentive to prevent loss of sales in its competing products." (Statement of Chairman Pitofsky and Commissioner Steiger at 4; emphasis in original.) Similarly, the Analysis of Proposed Consent Order to Aid Public Comment that accompanied the consent agreement simply asserted (at 5) that "Cadence does not... have incentives to provide access to its integrated circuit layout environments to suppliers of integrated circuit layout tools that compete with Cadence products." Because neither the Statement of Chairman Pitofsky and Commissioner Steiger nor the Analysis to Aid Public Comment describes how this conclusion was reached, it is difficult to identify precisely the source of the erroneous reasoning. Chiefly, however, it seems to reflect a manifestation of the "sunk cost fallacy," whereby it is argued that because Cadence has now sunk a large sum of money into acquiring CCT, this in and of itself would provide Cadence with an incentive not to deal with independent vendors of complements. This reasoning, of course, is fallacious: the cost incurred by Cadence in acquiring CCT -- whether a large or a small sum -- is irrelevant to profit-maximizing behavior once incurred, for bygones are forever bygones. The introduction of a superior new router, even if by an independent vendor, will increase the joint profits of Cadence and this vendor (irrespective of the amount spent in acquiring CCT), and both parties will have a profit incentive to facilitate its introduction.

Moreover, the Chairman and Commissioner Steiger also impute a sinister motive to Cadence's reluctance to deal with certain competitors, while failing to acknowledge that this reluctance almost surely represents a legitimate and well-founded interest in protecting its intellectual property. As the

into the sale of routing software, for efficient entry into the production of routing software increases the joint profits of the entrant and Cadence. If the Commission is correct that Cadence is "dominant" in the supply of software components complementary to routers, then of course Cadence may be in a position to expropriate -- *e.g.,* via royalties paid to Cadence by the entrant for the right to "connect" to Cadence's software -- some or all of the "efficiency rents" that otherwise would accrue to an efficient entrant. This, however, would constitute harm to a competitor, not to competition, and Cadence would have no incentive to set any such rates so high as to preclude entry.

The theory of harm and the remedy in this case also share many of the flaws that I pointed out in Time Warner.[7] In that case the Commission's action was based to a significant degree on the argument that increased vertical integration into cable programming on the part of Time Warner and Tele-Communications, Inc. would increase those firms' incentives to reduce the supply of independently produced television programming. Carried to its logical conclusion, this theory of harm constitutes a basis for challenging any vertical integration by large cable operators or large programmers -- even vertical integration occurring via *de novo* entry by a cable operator into the programming market or *de novo* entry by a programmer into distribution.

Now apply this train of thought to the current matter. Contrary to the analysis presented above, suppose that somehow Cadence could profit anticompetitively from denying interconnection rights to independent router vendors. If that were so, then it would not be sufficient merely to prevent Cadence from acquiring producers of complementary software. Rather, the Commission would have to take the further step of preventing Cadence from developing its own routers; for under the anticompetitive theory advanced in the complaint, any vertical integration by Cadence into routers, whether accomplished by acquisition or through internal expansion, would engender equivalent post-integration incentives to "foreclosure"

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Analysis to Aid Public Comment noted (at 4): "...Avant! Corporation, Cadence's leading competitor in the supply of integrated circuit layout environments,...has been charged criminally with conspiracy and theft of trade secrets from Cadence. Several top Avant! executives have been charged criminally as well."

[7] *See* my Dissenting Statement in Time Warner Inc., et al., *supra* note 1.

independent vendors of routing software.[8] Of course, as I noted in Time Warner, there is likely to be little enthusiasm for such a policy because there is a general predisposition to regard internal capacity expansion as procompetitive.[9]

Not only am I unpersuaded that Cadence's acquisition of CCT is likely to reduce competition in any relevant market, but -- as in SGI and Time Warner -- I would find the order unacceptable even were I convinced as to liability. As in Time Warner, the Commission imposes a "most favored nations" clause that requires Cadence to allow all independent router developers to participate in its software interface programs on terms that are "no less favorable than the terms applicable to any other participants in" those interface programs. Even apart from the usual problems with "most favored nations" clauses in consent orders,[10] this order -- as in both SGI and Time Warner -- will require that the Commission continuously regulate the prices and other conditions of access.

Indeed, compared to the order in the present case, the order in Time Warner was a model of clarity and enforceability. What does it mean to mandate treatment "no less favorable than" that granted to others, when Cadence's current Connections Program -- with well over 100 participants -- allows access prices to differ substantially across participants and imposes substantial restrictions on the breadth

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[8] Thus, it is unclear how the Commission should respond, under the logic of its complaint, were Cadence to introduce an internally developed software program (now provided by one or more independent vendors) that is complementary to its "dominant" suite of programs. Obviously Cadence would be in a position (similar to that alleged in the Commission's complaint) to block access to the Cadence design software if it wanted to. Even if Cadence did not terminate the independent vendors, consistent application of the economic logic of the present complaint seemingly would require the Commission to seek a prophylactic "open access" order against Cadence similar to the order sought here. This enforcement policy would of course have a number of adverse competitive consequences, including deterrence of Cadence from efficiently entering complementary software lines through internal expansion.

The observation in the Statement of Chairman Pitofsky and Commissioner Steiger (at note 4) that antitrust law has treated vertical integration by merger differently from internal vertical integration "for more than one hundred years" suggests that I do not recognize that the law provides for differential treatment of mergers and internal expansion. I simply intended to point out the illogic of finding vertical integration with identical economic consequences to be illegal under the Commission's standards of merger review, when that integration would be of no concern (and might even be applauded) if it resulted from simple internal expansion.

[9] In the present case, as in Time Warner, the Commission has alleged the existence of substantial pre-acquisition market power in both vertically related matters (routing software and the rest of the IC layout "suite" here, *see* complaint ¶¶ 9-11, and cable television programming and distribution in Time Warner). Under these circumstances, there is a straightforward reason why vertical integration is both profitable and procompetitive (*i.e.*, likely to result in lower prices to consumers): vertical integration would yield only one monopoly markup by the integrated firm, rather than separate markups (as in the pre-integration situation) by Cadence and CCT.

[10] As I noted in Time Warner, these clauses have the capacity to cause all prices to rise rather than to fall. Dissenting Statement, *supra* note 1, at 20. The Chairman and Commissioner Steiger (Statement at 5) seem comfortable with this outcome, provided that all vendors pay the same price.

and scope of the permitted connection rights?[11] Does it mean that router vendors pay a connection fee no higher than the highest fee paid by an existing participant? Or would they pay a fee no higher than the current lowest fee? Or does it mean something else? Router vendors surely will argue for the second interpretation -- a view also apparently shared by Chairman Pitofsky and Commission Steiger[12] -- yet there is no obvious reason why router vendors should be entitled to such a Commission-mandated preferential pricing arrangement, and neither my colleagues' Statement nor the Analysis to Aid Public Comment has offered one.

Similarly, does the "no less favorable" requirement mandate that the vendors of routing software obtain access rights as broad as the broadest rights now granted, or simply no worse than the narrowest now granted? And since the current Connections contracts are terminable at will by either party with 30 days' notice, does "no less favorable" mean only that router vendors must be given the same termination terms as other software vendors, or does it mean something else (*e.g.,* termination only for cause, where the "reasonableness" of the termination is subject to *ex post* evaluation by the Commission)?[13] The former interpretation of the order seems the most straightforward; however, it is also one that essentially would nullify the protection of independent router vendors and thus would render the order meaningless.[14]

The preceding suggests strongly that the real (albeit unstated) goal of the order is not to nullify any actual anticompetitive effects from the transaction, but rather to invalidate the principal aspects of Cadence's "Connections Program" (*i.e.,* the ability to charge different connection fees and to terminate vendors at will) without demonstrating that the program's provisions violate the law. There is little reason to believe that this program is harmful to competition, and there are strong efficiency reasons for allowing Cadence to set different fees for different vendors. Moreover, setting a uniform fee would result in price increases to at least some vendors.

Because I do not accept the Commission's theory of liability in this case, and because I find the prescribed remedy at best unenforceable and at worst competitively harmful, I dissent.

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[11] For example, CCT had been permitted to participate in the Connections Program with its printed circuit board router but not with its IC router.

[12] *See* Statement of Chairman Pitofsky and Commissioner Steiger at note 11.

[13] Moreover, does the terminability of the Connections contract on 30 days' notice mean that the "no less favorable" requirement might need to be reviewed every 30 days?

[14] The Chairman and Commissioner Steiger imply (Statement at note 11) that the exercise of this right would indeed constitute a violation of the order.

IN THE MATTER OF

# CVS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3762. Complaint, Aug. 13, 1997--Decision, Aug. 13, 1997*

This consent order requires the respondents, among other things, to complete the divestiture of a total of 120 Revco drug stores or pharmacy counters -- 114 stores in Virginia and six pharmacy counters in Binghamton, New York -- in order to restore competition. In addition, the respondents agreed to maintain the assets to be divested to preserve their viability and competitiveness, pending the divestiture.

## *Appearances*

For the Commission: *George Cary, Ernest Elmore, Ann Malester* and *William Baer.*

For the respondents: *Zenon Lankowsky*, in-house counsel for CVS. *Jack Staph*, in-house counsel for Revco. *Ronan Harty, Davis, Polk & Wardwell,* New York, N.Y. and *Louis Sernoff, Baker & Hostetler*, Washington, D.C.

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that CVS Corporation, through a wholly-owned subsidiary, North Acquisition Corp., has agreed to acquire Revco D.S., Inc., all corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

### I. DEFINITION

1. For the purposes of this complaint, *"MSA"* means Metropolitan Statistical Area as defined by the United States Department of Commerce, Bureau of the Census.

## II. RESPONDENTS

2. Respondent CVS Corporation ("CVS") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One CVS Drive, Woonsocket, Rhode Island.

3. Respondent Revco D.S., Inc. ("Revco") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1925 Enterprise Parkway, Twinsburg, Ohio.

4. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

## III. THE ACQUISITION

5. On February 6, 1997, CVS, through a wholly-owned subsidiary, North Acquisition Corp., entered into an Agreement and Plan of Merger to acquire and merge with Revco ("the Acquisition").

## IV. THE RELEVANT MARKETS

6. For purposes of this complaint, the relevant line of commerce in which to analyze the effect of the Acquisition is the retail sale of pharmacy services to third-party payors such as insurance carriers, health maintenance organizations, preferred provider organizations, and corporate employers. Pharmacy services refers to the filling of prescription drugs and related pharmacy service benefits. Third-party payors offer retail pharmacy service benefits to their beneficiaries, typically through intermediaries known as pharmacy benefit management firms or PBMs, who create and administer retail pharmacy networks on behalf of third-party payors, so that the beneficiaries of these third-party payors may go to any pharmacy participating in the retail pharmacy network to have their prescriptions filled.

7. For purposes of this complaint, the relevant sections of the country in which to analyze the effect of the Acquisition are:

a. The State of Virginia; and

b. The Binghamton, New York MSA.

8. The relevant markets set forth in paragraphs six and seven are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

9. Entry into the relevant markets is difficult or unlikely to occur at a sufficient scale to deter or counteract the effect of the Acquisition described in paragraph five.

10. CVS and Revco are actual competitors in the relevant markets.

## V. EFFECT OF THE ACQUISITION

11. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between CVS and Revco in the relevant markets;

b. By increasing the likelihood that CVS will unilaterally exercise market power in the relevant markets; and

c. By increasing the likelihood of collusion in the relevant markets.

12. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

## VI. VIOLATIONS CHARGED

13. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The Acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Revco D.S., Inc. ("Revco") by CVS Corporation ("CVS"), and the respondents having been furnished thereafter with a copy of a draft of complaint that the

Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent CVS Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One CVS Drive, Woonsocket, Rhode Island.

2. Respondent Revco D.S., Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1925 Enterprise Parkway, Twinsburg, Ohio.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### I.

*It is ordered*, That, as used in this order, the following definitions shall apply:

A. *"CVS"* means CVS Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by CVS, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each. CVS, after consummation of the Acquisition, includes Revco.

B. *"Revco"* means Revco D.S., Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Revco, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. *"Respondents"* mean CVS and Revco.

D. *"Commission"* means the Federal Trade Commission.

E. *"Acquisition"* means CVS's proposed acquisition of all of the outstanding voting securities of and merger with Revco pursuant to the Agreement and Plan of Merger dated February 6, 1997.

F. *"J.C. Penney"* means J.C. Penney Company, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 6501 Legacy Drive, Plano, Texas.

G. *"Eckerd"* means Eckerd Corporation, an affiliate of J.C. Penney. Eckerd is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 8333 Bryan Dairy Road, Largo, Florida.

H. *"Medicine Shoppe"* means Medicine Shoppe International, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 1100 North Lindbergh, St. Louis, Missouri.

I. *"Pharmacy Operations"* means Pharmacy Operations, Inc., a wholly-owned subsidiary of Medicine Shoppe. Pharmacy Operations is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with offices located at 1100 North Lindbergh, St. Louis, Missouri.

J. *"Acquirer(s)"* means Eckerd, Medicine Shoppe or Pharmacy Operations, and/or the entity or entities approved by the Commission to acquire: the Virginia Assets to be Divested pursuant to paragraph II.A.1 of this order; the Revco Pharmacy Assets pursuant to paragraph II.B.1 or the New York Assets to be Divested pursuant to

paragraph II.B.2 of this order; the Revco Virginia Assets pursuant to paragraph III.A of this order; or the CVS Binghamton Assets pursuant to paragraph III.B of this order.

K. *"Landlord consents"* means all consents from all landlords that are necessary to effect the complete transfer to the Acquirer(s) of the assets required to be divested pursuant to this order.

L. *"MSA"* means Metropolitan Statistical Area, which refers to geographic areas as defined by the United States Department of Commerce, Bureau of the Census.

M. *"Retail drug store"* means a full-line retail store that carries a wide variety of prescription and nonprescription medicines and miscellaneous items, including, but not limited to, drugs, pharmaceuticals, patent medicines, sundries, tobacco products, and other merchandise.

N. *"Retail drug store assets"* means all assets constituting the retail drug store business, excluding those assets pertaining to either the Revco or CVS trade name, trade dress, trade marks and service marks, and including, but not limited to:

1. Leases and properties;

2. Zoning approvals and registrations;

3. Books, records, reports, dockets and lists relating to the retail drug store business;

4. Retail drug store inventory and storage capacity;

5. All records of stock keeping units ("SKUs"), *e.g.,* all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales;

6. Lists of all customers (including third party insurers) and all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;

7. All pharmacy files, documents, instructions, papers, books, computer files and records and all other records in any media relating to the retail drug store business;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and all names of prescription drug manufacturers and distributors under contract with Revco, at the Acquirer(s)' option;

9. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property; and

10. Goodwill, tangible and intangible, utilized in retail drug stores.

O. *"Revco Pharmacy Business"* means Revco's business of selling pharmacy services including prescription drugs at any of the retail drug stores listed in Schedule A of this order, but does not include Revco's business of selling other products in those retail drug stores.

P. *"Revco Pharmacy Assets"* means all assets constituting the Revco Pharmacy Business, excluding those assets pertaining to the Revco trade names, trade dress, trade marks and service marks, and including but not limited to:

1. Leases, at Medicine Shoppe's option;

2. Zoning approvals and registrations, at Medicine Shoppe's option;

3. Books, records, manuals, and operations reports, relating to the Revco Pharmacy Business;

4. Inventory instructions, or, at Medicine Shoppe's option, lists of SKUs, *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;

5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s); and

6. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

Q. *"Virginia Assets to be Divested"* means the Revco Retail Drug Store Assets described in Schedule B of this order.

R. *"Revco Virginia Assets"* means all of Revco's Retail Drug Store Assets located in the State of Virginia.

S. *"New York Assets to be Divested"* means the Revco Retail Drug Store Assets described in Schedule A of this order.

T. *"CVS Binghamton Assets"* means all of the CVS Retail Drug Store Assets located in the Binghamton, New York MSA.

U. *"Eckerd Agreement"* means the Purchase and Sale Agreement between Eckerd and CVS executed on May 16, 1997, for the

divestiture by respondents to Eckerd of the Virginia Assets to be Divested.

V. *"Medicine Shoppe Agreement"* means the Purchase and Sale Agreement between Pharmacy Operations or Medicine Shoppe and CVS executed on May 21, 1997, for the divestiture by respondents to Medicine Shoppe of the Revco Pharmacy Assets to be Divested.

II.

*It is further ordered*, That:

A. Respondents shall divest, absolutely and in good faith, the Virginia Assets to be Divested to:

1. Eckerd, in accordance with the Eckerd Agreement dated May 16, 1997, no later than,

a. Ten (10) days after the date on which this order becomes final, or

b. Four (4) months after acceptance of the Agreement Containing Consent Order by the Commission,

whichever is later; or

2. An Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within three (3) months after the date on which this order becomes final;

provided that the closing date of the Eckerd Agreement or any other agreement pursuant to which the Virginia Assets to be Divested are divested to an Acquirer shall not occur until after respondents have obtained all required Landlord Consents.

B. Respondents shall divest, absolutely and in good faith, either:

1. The Revco Pharmacy Assets to Medicine Shoppe or Pharmacy Operations in accordance with the Medicine Shoppe Agreement May 21, 1997, no later than,

a. Ten (10) days after the date on which this order becomes final, or

b. Four (4) months after acceptance of the Agreement Containing Consent Order by the Commission,

whichever is later; or

2. The New York Assets to be Divested to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within three (3) months after the date on which this order becomes final;

provided that the closing date of the Medicine Shoppe Agreement or any other agreement pursuant to which the New York Assets to be Divested are divested to an Acquirer shall not occur until after respondents have obtained all required landlord consents.

C. The purpose of the divestitures described herein is to ensure the continued operation of the divestiture assets as assets engaged in the retail sale of pharmacy services to third party payors, and to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

*It is further ordered*, That:

A. If respondents fail to divest absolutely and in good faith the Virginia Assets to be Divested pursuant to paragraph II.A of this order, the Commission may appoint a trustee to divest the Revco Virginia Assets.

B. If respondents fail to divest absolutely and in good faith either the New York Assets to be Divested or the Revco Pharmacy Assets pursuant to paragraph II.B of this order, the Commission may appoint a trustee to divest the CVS Binghamton Assets.

C. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

D. The trustee appointed to accomplish any divestiture pursuant to paragraphs III.A or III.B may be the same person. If a trustee is appointed by the Commission or a court pursuant to paragraphs III.A or III.B of this order, respondents shall consent to the following terms

and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee(s), subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to accomplish the divestitures described in paragraphs III.A and III.B.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect each divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.D.3 to accomplish each divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan for each divestiture required by this order or believes that each divestiture required by this order can be achieved within a reasonable time, then that divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for each divestiture only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Revco Virginia Assets and the CVS Binghamton Assets or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of each divestiture. Any delays in any divestiture caused by respondents shall extend the time for that divestiture under this paragraph in an amount

equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to make each divestiture required by this order at no minimum price. Each divestiture shall be made in the manner consistent with the terms of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, and at reasonable fees, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from each divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's accomplishing each divestiture required by paragraphs III.A and III.B.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in this paragraph.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be reasonably necessary or appropriate to accomplish each divestiture required by this order.

11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Revco Virginia Assets and the CVS Binghamton Assets.

12. The trustee shall have no obligation or authority to operate or maintain the Revco Virginia Assets or the CVS Binghamton Assets.

13. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this order.

IV.

*It is further ordered*, That:

A. Pending the divestiture of the Virginia Assets to be Divested pursuant to paragraph II.A and either the Revco Pharmacy Assets or the New York Assets to be Divested pursuant to paragraph II.B, the Revco Virginia Assets pursuant to paragraph III.A, or the CVS Binghamton Assets pursuant to paragraph III.B, respondents shall take such actions as are necessary to maintain the viability, marketability and competitiveness of all of these assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of these assets except for ordinary wear and tear.

B. Respondents shall comply with all terms of the Asset Maintenance Agreement, attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as all the divestitures required by this order have been accomplished.

V.

*It is further ordered*, That within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II

and III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the requirements of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for each divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning each divestiture.

VI.

*It is further ordered*, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

VII.

*It is further ordered*, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

B. Upon five days' notice to respondents and without restraint or interference from respondents, to interview officers, directors, or employees of respondents.

SCHEDULE A

REVCO NEW YORK STORE LISTING

Revco Store Number 2000
523 Hooper Road
Endwell, NY 13760

Revco Store Number 2002
133 Front Street
Vestal, NY 13850

Revco Store Number 2003
4700 Vestal Parkway East
Vestal, NY

Revco Store Number 2005
1318 Front Street
Binghamton, NY 13901

Revco Store Number 2007
1183-85 Vestal Avenue
Binghamton, NY 13903

Revco Store Number 2020
310 Exchange Street
Endicott, NY 13760

SCHEDULE B

REVCO VIRGINIA STORE LISTING

Revco Store Number 842
Interstate Rt 40 & 46
Blackstone, VA 23824

Revco Store Number 2380
4408 West Hundred Road
Chester, VA 23831

Revco Store Number 1160
Colonial Square Shopping Center
12 Colonial Square
Colonial Heights VA 23834

Revco Store Number 389
220 Market Drive
Emporia, VA 23847

Revco Store Number 972
University Square Shopping Center
20825 Woodpecker Road
Ettrick, VA 23803

Revco Store Number 4513
Patrick Henry Center
1506 S. Main Street
Farmville, VA 23901

Revco Store Number 998
5207 Plaza Drive
Hopewell, VA 23860

Revco Store Number 4001
115 Brunswick Square Ct.
Lawrenceville, VA 23868

Revco Store Number 1473
Tanbark Plaza Shopping Center
74 Tanbark Plaza
Lovingston, VA 22949

Revco Store Number 2519
7199 Stonewall Pkwy.
Mechanicsville, VA 23111

Revco Store Number 2522
Atlee Square Shopping Center
9159 Atlee Road
Mechanicsville, VA 23116

Revco Store Number 2517
Rockwood Square
10163 Hull Street Road
Midlothian, VA 23113

Revco Store Number 187
4310 Westgate Drive
Petersburg, VA 23803

Revco Store Number 4504
2733 S. Crater Road
Petersburg, VA 23805

Revco Store Number 2754
9100 Pocahontas Trail
Providence Forge, VA 23140

Revco Store Number 2755
New Kent Crossing Shopping Center
2587 New Kent Hwy.
Quinton, VA 23141

Revco Store Number 383
12000 Ridgefield Pkwy.
Richmond, VA 23233

Revco Store Number 390
6401 Jahnke Road
Richmond, VA 23225

Revco Store Number 398
2805 West Broad Street
Richmond, VA 23230

Revco Store Number 538
Meadowwood Square
5116 Richmond Henrico Turnpike
Richmond, VA 23227

Revco Store Number 553
Cary Village Shopping Center
3142 West Cary Street
Richmond, VA 23221

Revco Store Number 1313
6011 Nine Mile
Richmond, VA 23223

Revco Store Number 1436
2917 North Avenue
Richmond, VA 23222

Revco Store Number 4019
Hungarybrook Shopping Center
1292 Concord Avenue
Richmond, VA 23228

Revco Store Number 4578
Quicoccasin Station
8920 Quioccasin Road
Richmond, VA 22560

Revco Store Number 4562
While Oak Shopping Center
1840 Tappahannock Blvd.
Tappahannock, VA 22560

Revco Store Number 4387
Pantops Center
540 Pantops Center
Charlottesville, VA 22911

Revco Store Number 313
Liberty Plaza
1800 Liberty Street
Chesapeake, VA 23324

Revco Store Number 1140
Poplar Hill Plaza
3138 Western Branch Blvd.
Chesapeake, VA 23321

Revco Store Number 505
7127 Staples Mill Road
Richmond, VA 23228

Revco Store Number 551
326 East Broad Street
Richmond, VA 23219

Revco Store Number 1158
Glen Lea Shopping Center
3824 Mechanicsville Pike
Richmond, VA 23223

Revco Store Number 1319
Willow Place Shopping Center
5440 West Broad
Richmond, VA 23230

Revco Store Number 2551
Robious Hall Shopping Center
10030 Robious Road
Richmond, VA 23235

Revco Store Number 4391
Irongate Village Shopping Center
6423 Iron Bridge Road
Richmond, VA 23234

Revco Store Number 4585
1102 Courthouse Road
Richmond, VA 23236

Revco Store Number 4000
West Point Square
100 Winter Street Unit 105
West Point, VA 23181

Revco Store Number 194
1367 Kempsville Road
Chesapeake, VA 23320

Revco Store Number 350
4321 Indian River Road
Chesapeake, VA 23325

Revco Store Number 1186
Wilson Village Shopping Center
328 Battlefield Blvd. S.
Chesapeake, VA 23320

Revco Store Number 4003
Las Gaviotas Shopping Center
1245 Cedar Road, Suite B
Chesapeake, VA 23320

Revco Store Number 4420
Centersville Crossing Shopping Center
413 Centerville Turnpike
Chesapeake, VA 23320

Revco Store Number 4552
2313 S. Military Hwy.
Chesapeake, VA 23320

Revco Store Number 4541
Southhampton Shopping Center
1332 Armory Drive
Franklin, VA 23851

Revco Store Number 426
Kecoughtan Shopping Center
3857 Kecoughtan Road
Hampton, VA 23669

Revco Store Number 1384
4111 West Mercury Blvd.
Hampton, VA 23666

Revco Store Number 4679
Big Bethel Road and Hampton Road Parkway
Hampton, VA 23666

Revco Store Number 621
Newport Square Shopping Center
846 Newport Square Shop Center
Newport News, VA 23601

Revco Store Number 1143
14865 Warwick Blvd.
Newport News, VA 23608

Revco Store Number 2589
Southeast Shopping Center
2305 Jefferson Avenue
Newport News, VA 23607

Revco Store Number 4020
Taylor Road Plaza
3325 Taylor Road, Suite 118
Chesapeake, VA 23321

Revco Store Number 4530
Woodford Square Shopping Center
701-D North Battlefield
Chesapeake, VA 23320

Revco Store Number 4607
3005 Old Mill Road
Chesapeake, VA 23323

Revco Store Number 1268
Heritage Square Shopping Center
4324 Geo. Washington Memorial Highway
Grafton, VA 23692

Revco Store Number 1073
1955 E. Pembroke Avenue
Hampton, VA 23663

Revco Store Number 4326
2305 Kecoughtan Road
Hampton, VA 23661

Revco Store Number 2741
York River Shopping Center
2318 York Crs. Drive Pob 1106
Hayes, VA 23072

Revco Store Number 1096
Newmarket Plaza Shopping Center
605 Newmarket Drive Newmarket Plaza
Newport News, VA 23605

Revco Store Number 1613
13271 Warwick Blvd.
Newport News, VA 23602

Revco Store Number 4022
Richneck Center
12917 Jefferson Avenue
Newport News, VA 23602

Revco Store Number 4501
10451 Jefferson Avenue
Newport News, VA 23605

Revco Store Number 431
Southern Shopping Center
No. 2 Southern S/C
Norfolk, VA 23505

Revco Store Number 500
Colley Village Shopping Center
2301 Colley Avenue
Norfolk, VA 23517

Revco Store Number 595
742-A West 21st Street
Norfolk, VA 23517

Revco Store Number 715
1101 East Little Creek Road
Norfolk, VA 23518

Revco Store Number 1029
The Monticello Building
258 Granby Street
Norfolk, VA 23510

Revco Store Number 1097
1853 East Little Creek Road
Norfolk, VA 23518

Revco Store Number 2574
890 Kempsville Road
Norfolk, VA 23502

Revco Store Number 750
5788 Churchland Blvd.
Portsmouth, VA 23703

Revco Store Number 1061
3531 Airline Blvd.
Portsmouth, VA 23701

Revco Store Number 2704
2004 Victory Blvd.
Portsmouth, VA 23702

Revco Store Number 117
Downtown Plaza Shopping Center
32 Downtown Plaza S/C
Norfolk, VA 23510

Revco Store Number 493
Midtown Shopping Center
7628 Granby Street
Norfolk, VA 23505

Revco Store Number 550
6204-H N. Military Hwy.
Norfolk, VA 23518

Revco Store Number 703
Sewells Point Shopping Center
2330 Azalea Garden Road
Norfolk, VA 23513

Revco Store Number 882
Ocean View Shopping Center
163 West Ocean View Avenue
Norfolk, VA 23503

Revco Store Number 1068
Suburban Park Shopping Center
7526 Granby Street
Norfolk, VA 23505

Revco Store Number 2375
3212 Tidewater Road
Norfolk, VA 23509

Revco Store Number 4009
475 Wythe Creek Road
Poquoson, VA 23662

Revco Store Number 871
3116 High Street
Portsmouth, VA 23707

Revco Store Number 1113
326 High Street
Portsmouth, VA 23704

Revco Store Number 4327
Manor Village Shopping Center
6219 Portsmouth Blvd.
Portsmouth, VA 23701

Revco Store Number 835
Smithfield Plaza Shopping Center
1280 Smithfield Plaza
Smithfield, VA 23430

Revco Store Number 1376
571 East Constance Road
Suffolk, VA 23434

Revco Store Number 100
1949 Lynnhaven Parkway
Virginia Beach, VA 23456

Revco Store Number 113
1577 General Booth Blvd.
Virginia Beach, VA 23454

Revco Store Number 341
6531 College Park Square
Virginia Beach, VA 23464

Revco Store Number 374
Fairfield Shopping Center
5232 Fairfield S/C
Virginia Beach, VA 23464

Revco Store Number 464
Kemps River Crossing
1309 Fordham Drive
Virginia Beach, VA 23464

Revco Store Number 787
1075 Independence Blvd.
Virginia Beach, VA 23455

Revco Store Number 883
880 S. Military Hwy.
Virginia Beach, VA 23464

Revco Store Number 1183
5610 Princess Anne Road
Virginia Beach, VA 23462

Revco Store Number 1200
3600 South Plaza Trail
Virginia Beach, VA 23452

Revco Store Number 1112
Holland Plaza Shopping Center
1240 Holland Road
Suffolk, Va 23434

Revco Store Number 4385
Suffolk Shopping Center
1405 North Main Street
Suffolk, VA 23434

Revco Store Number 109
4221 Pleasant Valley Road
Virginia Beach, VA 23464

Revco Store Number 116
Linkhorn Shopping Center
980 Laskin Road
Virginia Beach, VA 23451

Revco Store Number 344
3333 Virginia Beach Blvd.
Virginia Beach, VA 23452

Revco Store Number 440
Holland Shopping Center
4324 Holland Road
Virginia Beach, VA 23452

Revco Store Number 603
Hilltop North Shopping Center
750 Hilltop North S/C
Virginia Beach, VA 23451

Revco Store Number 881
Birchwood Mall
3756 Virginia Beach Blvd.
Virginia Beach, VA 23452

Revco Store Number 1188
Pembroke Meadows Shopping Center
748 Independence Blvd.
Virginia Beach, VA 23455

Revco Store Number 1110
2356-C Virginia Beach Blvd.
Virginia Beach, VA 23454

Revco Store Number 1396
Great Neck Shopping Center
1216 Great Neck Village S/C
Virginia Beach, VA 23454

Revco Store Number 1656
Virginia Beach Blvd. and Dorset Street
Virginia Beach, VA 23462

Revco Store Number 2725
2005 Sandbridge Road #101
Virginia Beach, VA 23456

Revco Store Number 4406
1012 Fallbrook Bend
Virginia Beach, VA 23455

Revco Store Number 45542
Shipp's Corner Shopping Center
3208 Holland Road, Suite 11
Virginia Beach, VA 23456

Revco Store Number 4555
Birdneck Shopping Center
1077 Virginia Beach Blvd.
Virginia Beach, VA 23451

Revco Store Number 4599
Lake Shores Plaza Shopping Center
5193 Shore Drive #109
Virginia Beach, VA 23455

Revco Store Number 382
Governor's Green Shopping Center
4511-K John Tyler Hwy.
Williamsburg, VA 23185

Revco Store Number 1147
James-York Shopping Center
701 Merrimac Trail
Williamsburg, VA 23185

Revco Store Number 2573
124 Waller Mill Road
Williamsburg, VA 23185

Revco Store Number 1625
Shoppes at Yorktown
US 17 & Goodwin Neck Road
York, VA 23692

## APPENDIX I

## ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between CVS Corporation ("CVS"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One CVS Drive, Woonsocket, Rhode Island; Revco D.S., Inc. ("Revco"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1925 Enterprise Parkway, Twinsburg, Ohio (collectively "proposed respondents"); and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively "the Parties").

## PREMISES

*Whereas*, CVS has proposed to acquire all of the outstanding voting securities of and to merge (through a wholly-owned

subsidiary) with Revco D.S., Inc., pursuant to an agreement and plan of merger dated February 6, 1997 ("the proposed Acquisition"); and

*Whereas*, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

*Whereas*, if the Commission accepts the attached Agreement Containing Consent Order ("consent order"), the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently either withdraw such acceptance or issue and serve its complaint and its decision and final order in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

*Whereas*, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Revco Virginia Assets, the Virginia Assets to be Divested, the Revco Pharmacy Assets, the New York Assets to be Divested, and the CVS Binghamton Assets as described in the attached consent order (hereinafter sometimes referred to as "Assets") during the period prior to their divestiture, any divestiture resulting from any administrative proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

*Whereas*, the Commission is concerned that prior to any divestitures to the Acquirer(s) approved by the Commission, it may be necessary to preserve the continued viability and competitiveness of the Assets; and

*Whereas*, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestitures to the Acquirer(s) approved by the Commission under the terms of the order, in order to remedy any anticompetitive effects of the proposed Acquisition; and

*Whereas*, proposed respondents entering into this Agreement shall in no way be construed as an admission by proposed respondents that the proposed Acquisition is illegal; and

*Whereas*, proposed respondents understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

*Now, therefore*, in consideration of the Commission's agreement that at the time it accepts the consent order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, the Parties agree as follows:

TERMS OF AGREEMENT

1. Proposed respondents agree to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Proposed respondents agree that from the date proposed respondents sign this Agreement until the earlier of the dates listed in subparagraphs 2.a and 2.b, proposed respondents will comply with the provisions of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the divestitures as set out in the consent order have been completed.

3. Proposed respondents shall maintain the viability and marketability of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall they sell, transfer, encumber or otherwise impair their marketability or viability.

4. Proposed respondents shall maintain the competitiveness of the Assets. This includes, but is not limited to, maintaining promotions and discount policies, and continuing specific store services (such as, for example, hours of operation and operation of specific departments). In particular, proposed respondents shall continue to offer to customers who obtain pharmacy services at the Assets the same type and quality of pharmacy services that are offered at the proposed respondents' retail drug stores that are not subject to the consent order's divestiture provisions.

5. Should the Commission seek in any proceeding to compel proposed respondents to divest themselves of the Assets or to seek any other injunctive or equitable relief, proposed respondents shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the proposed Acquisition. Proposed respondents also waive all rights to contest the validity of this Agreement.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with five (5) days' notice to proposed respondents and

to their principal office(s), proposed respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of proposed respondents, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of proposed respondents relating to compliance with this Agreement; and

b. To interview officers or employees of proposed respondents, who may have counsel present, regarding any such matters.

7. This Agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

# SULZER LIMITED

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3559. Consent Order, Feb. 23, 1995--Modifying Order, Aug. 15, 1997*

This order reopens and modifies a 1995 consent order so that the language in paragraph IV.A of the final consent order conforms with the language of the proposed consent agreement that was signed by the respondent and accepted by the Commission for public comment.

## ORDER AMENDING CONSENT ORDER

The order in this matter was issued on February 23, 1995. The language in paragraph IV.A of the order does not conform to that contained in paragraph IV.A of the agreement containing consent order ("consent agreement") signed by Sulzer and accepted by the Commission on September 12, 1994, for public comment.

The public interest would be served by conforming the language of the order with that contained in the consent agreement. Sulzer has waived any rights it may have under Section 3.72(b) of the Commission's Rules of Practice and consents to the changes contemplated by this order. Accordingly,

*It is ordered*, That this matter be, and it hereby is, reopened; and

*It is further ordered*, That paragraph IV.A of the consent order in Docket No. C-3559, issued on February 23, 1995, be, and it hereby is, amended to read as follows:

A. For a ten (10) year period commencing on the date this order becomes final, Sulzer shall not enter into, obtain, make, carry out or enforce any exclusive agreements with Sumitomo Chemical Company Limited or otherwise take any action whatsoever, directly or indirectly, that would prevent Sumitomo Chemical Company Limited from selling Sumitomo Polyester to any Commission-approved acquirer of the Amdry 2010 Information. Within thirty days after the order becomes final, respondent shall provide a copy of the order to each person at Sumitomo Chemical Company Limited with whom respondent has contact in connection with the purchase of Sumitomo Polyester.

IN THE MATTER OF

## APPLE COMPUTER, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3763. Complaint, Aug. 18, 1997--Decision, Aug. 18, 1997*

This consent order requires, among other things, the respondent to offer to eligible consumers who purchased the Performa 550 or 560, or the Macintosh LC 550 computers on or after April 1, 1994, the upgrade kits at less than half the original list price and to rebate $776 to consumers who already have purchased the upgrade. The consent order also prohibits Apple Computer from misrepresenting the availability of any microprocessor upgrade product, and from representing that computer hardware is currently upgradeable unless the upgrade is then available in reasonable quantities.

### *Appearances*

For the Commission: *Matthew Gold, Linda Badger* and *Jeffrey Klurfeld.*

For the respondent: *James Spears, Gadsby & Hannah*, Washington, D.C.

### COMPLAINT

The Federal Trade Commission, having reason to believe that Apple Computer, Inc., ("Apple" or "respondent"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Apple is a California corporation with its offices and principal place of business located at One Infinite Loop, Cupertino, California.

PAR. 2. Apple has manufactured, advertised, labeled, offered for sale, sold, and distributed the "Performa 550," "Macintosh LC 550," and "Performa 560" personal computers, and other computer hardware and software to consumers. The Performa 550, Macintosh LC 550, and Performa 560 models are based on the Motorola 68030 microprocessor. While continuing to promote the sale of these computers, respondent introduced a new series of computers based on the faster, more powerful "PowerPC" microprocessor. Beginning approximately April 1, 1994, subsequent to this introduction of the

new chip, respondent advertised Performa 550, Macintosh LC 550, and Performa 560 computers as upgradeable to PowerPC performance.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent disseminated or caused to be disseminated advertisements for the "PowerPC" upgrade to the Performa 550 and Performa 560 computers, including but not necessarily limited to a red sticker that was placed on the boxes containing these computers, attached as Exhibit A. These advertisements contain the following statement:

"Ready for PowerPC upgrade." [Exhibit A]

PAR. 5. Respondent disseminated or caused to be disseminated advertisements for the "PowerPC" upgrade to the Performa 550, Macintosh LC 550, and Performa 560 computers, including but not necessarily limited to the attached Exhibits B-D. These advertisements contain the following statements:

A. "And when you're ready to expand your [Macintosh LC 550] system for more performance, you can install an optional CD-ROM drive, add an Ethernet card, or upgrade to our new Power Macintosh TM technology."
[Exhibit B (Print: "Apple Education Recommended Products At a Glance")]

B. "Can a personal computer grow up with your family?
With technology changing so quickly, it's only natural to wonder whether the computer you buy today will become obsolete tomorrow. That's why Apple designed the Macintosh Performa to work as well tomorrow as it does today.

. . .

You can even add extra memory or upgrade your Performa to the PowerPC chip (making it virtually impossible to outgrow).
Performa
The Family Macintosh"
[Exhibit C (Print: "Can a personal computer grow up with your family?")]

C. "A PARENT'S GUIDE TO COMPUTERS

. . .

Every Performa can grow with your family. Each one has enough memory, power, and storage space to serve your family for years. However, should you decide you want to upgrade in the future, you can expand your Performa's RAM, hard drive storage, and even microprocessor to keep step with improvements in technology (such as the hot new PowerPC chip)."
[Exhibit D (Special Advertising Section insert: "A Parent's Guide To Computers.")]

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that a PowerPC upgrade was available to consumers at the time that they purchased a Performa 550 or Performa 560 computer.

PAR. 7. In truth and in fact, a PowerPC upgrade was not available to consumers at the time that they purchased a Performa 550 or Performa 560 computer. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraphs four and five, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that a PowerPC upgrade would be available within a reasonable period of time after the purchase of a Performa 550, Macintosh LC 550, or Performa 560 computer.

PAR. 9. In truth and in fact, the PowerPC upgrade was not available within a reasonable period of time after the purchase of a Performa 550, Macintosh LC 550, or Performa 560 computer. No such upgrade was offered by respondent for at least one year after it began representing that the Performa 550, Macintosh LC 550, or Performa 560 computers were upgradeable. Indeed, by the time respondent made the upgrade available, the cost of the upgrade approached the cost of an entirely new computer with a PowerPC microprocessor. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraphs four and five, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraphs six and eight, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time it made the representations set forth in paragraphs six and eight, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. In its advertising of the Performa 550, Macintosh LC 550, and Performa 560 computers, respondent represented that these computers were upgradeable to PowerPC technology. Respondent failed to disclose that, in order to obtain the PowerPC technology, consumers would need to purchase and install an upgrade package that included not only a PowerPC upgrade card, but also a new logic board. As a result, consumers were not aware that they would have to incur the cost and inconvenience associated with the replacement of the logic board. The fact that a logic board was a component of the upgrade package would be material to consumers in their decision to purchase the computer. The failure to disclose this fact, in light of the representations made, was a deceptive practice.

PAR. 13. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

April 1994

# Apple Education Recommended Products At a Glance

K–12 Institutional purchase only

**Macintosh LC 550**

Perfect for general student use, the Mac LC 550 combines our all-in-one design with a price that's hard to beat. Our recommended system includes a built-in Sony Trinitron™ 14" RGB color display, stereo speakers and microphone. And when you're ready to expand your system for more performance, you can install an optional CD-ROM drive, add an Ethernet card, or upgrade to our new Power Macintosh™ technology.

– 33MHz 68030 processor

– 4MB memory (expandable to 36MB)

– 160MB hard drive

– Apple SuperDrive™ (reads and writes Macintosh, Windows, DOS, and OS/2 files with optional Macintosh PC Exchange software)
– LC-compatible processor direct expansion slot for high-speed Ethernet networking, Apple IIe compatibility, or video input/output port card
– Ready for PowerPC™ processor upgrade
– Expansion bay for built-in CD-ROM drive upgrade
– Sony Trinitron high resolution 14" display (256 colors)

*Macintosh LC 550 Color System includes Mac LC 550 with built-in Sony Trinitron 14" color display, stereo speakers, microphone, Apple Keyboard II and mouse.*
Without setup (#H1890LL/A) $1199
With setup (#H1891LL/A) $1299

**Macintosh LC 575**

The new Macintosh LC 575 whips through math problems, science experiments, class recordkeeping, and multimedia presentations up to 300 percent faster than a Mac LC III. Which makes this an ideal system for classrooms, labs, and teacher desktops alike. Its monitor, speakers, microphone, hard drive, and CD-ROM are all inside a single case—there's just one cord to plug in, and no tangle of wires to contend with. Upgradable to our new RISC-based Power Macintosh technology.

– 33MHz 68LC040 processor

– 5MB memory (expandable to 36MB)

– 160MB hard drive

– Apple SuperDrive
– Internal AppleCD™ 300i Plus dual speed CD-ROM drive
– Two expansion slots—one for LC type PDS cards (for video capture and display, for example) and one for either low-cost Ethernet networking or a modem
– Ready for PowerPC processor upgrade
– Sony Trinitron high resolution 14" display (over 32,000 colors)

*Macintosh LC 575 CD Color System includes Mac LC 575 (with CD-ROM drive, built-in Sony Trinitron 14" color display, stereo speakers, microphone, Apple Keyboard II and mouse).*
Without setup (#H1892LL/A) $1699
With setup (#H1893LL/A) $1759

EXHIBIT C

# Can a personal computer grow up with your family?

With technology changing so quickly, it's only natural to wonder whether the computer you buy today will become obsolete tomorrow. That's why Apple designed the Macintosh® Performa™ to work as well tomorrow as it does today.

*You grow with your Performa.*

Performa comes with all the software you're ever likely to need – enough to write letters, do a household budget, bring work home from the office and more.

Performa is also easy to learn and use, right out of the box. So this computer can help your kids from the first day of kindergarten through the last day of college.

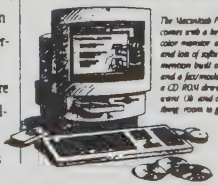
If your interests grow or change, there are thousands of different programs available to meet your needs. Plus, since more homes and schools use Apple® computers than any other brand, you're assured access to the newest, most exciting software.

*Performa grows with you.*

Apple's unique plug-and-play philosophy makes it easy to add new capabilities to your Macintosh Performa – today, tomorrow, even years down the road.

Plug-and-play means just what it sounds like. If you want to add a printer, just plug it in. If you need more storage space, just plug in a hard drive. And so on.

There are no cards to fool with. There are no AUTOEXEC.BAT or CONFIG.SYS files to modify. No other computer makes it this simple to add what you need.



The Macintosh Performa comes with a keyboard, a color monitor, a mouse and lots of software, not to mention built-in speakers and a fax/modem – even a CD-ROM drive, if you want. (It and one other thing, room to grow.

You can even add extra memory or upgrade your Performa to the PowerPC™ chip (making it virtually impossible to outgrow).

And every Performa also comes with a full year of in-home service and a lifetime of toll-free telephone support (making your future virtually worry-free).

So year after year, your family can enjoy the kind of power you buy a computer for in the first place. The power to be your best.

Performa

The Family Macintosh

EXHIBIT D

**Exhibit 4**

*Special Advertising Section*

# A PARENT'S GUIDE
## TO COMPUTERS

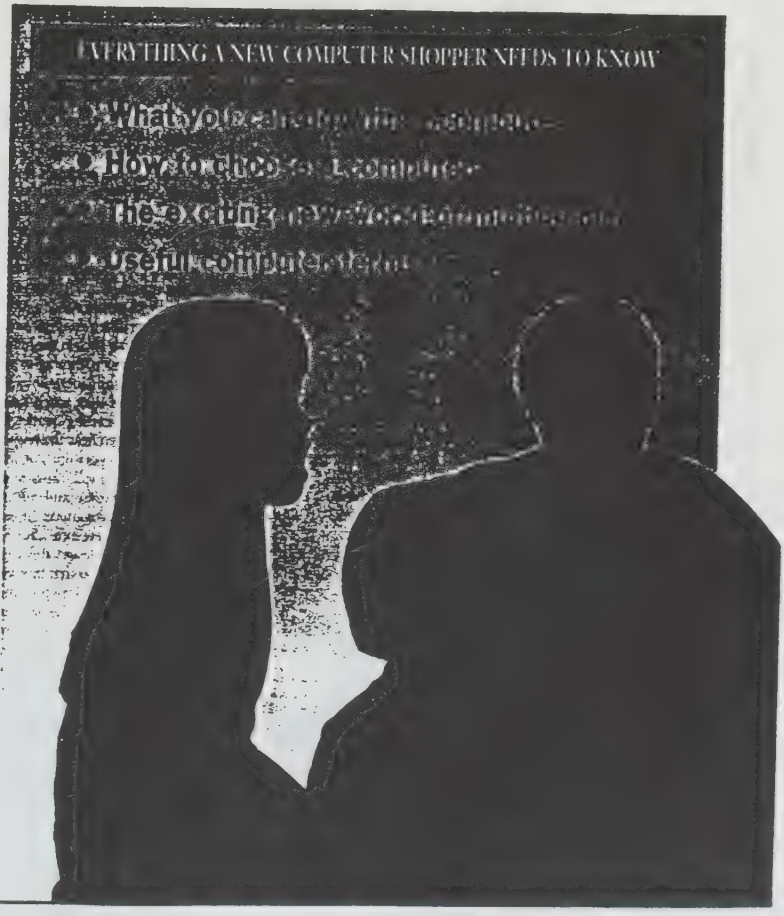


EXHIBIT D

*Special Advertising Section*

# THE MACINTOSH PERFORMA

## THE PERFECT CHOICE

THE POWER AND SIMPLICITY of the Mac makes it the perfect choice for everyone in the family. More students use Apple personal computers than any other brand, so chances are your kids are already using them in school. The Macintosh's easy-to-use point-and-click operation opens computing to any kid—or adult—who can use a mouse.

The Performa family is designed to be right at home with your family. It's easy to buy, easy to set up, and easy to use. And each Performa can run any of the literally thousands of educational, business, home productivity, and entertainment programs available.

## EVERYTHING YOU NEED TO GET STARTED

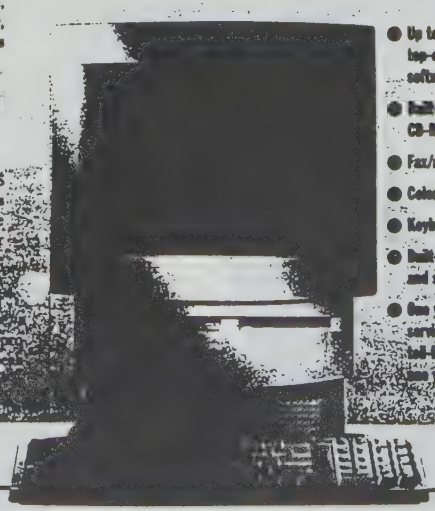
A PERFORMA MAKES computer shopping as easy as can be. All you have to decide is which model best suits your needs. Apple has done all the rest. Everything you need is in one box: the computer, a color monitor, a keyboard, a mouse, a fax/modem, up to 16 software programs, digital sound, and speaker(s). Some models even have a CD-ROM drive built right in.

Your work and play springs to life in brilliant color on the Performa's high-resolution color monitor. Its 14-inch screen gives you plenty of workspace.

The built-in fax/modem not only can connect you to the vast realm of telecommunications and on-line services, but you can also send faxes directly from your computer to any fax machine.

Every Performa can grow with your family. Each one has enough memory, power, and storage space to serve your family for years. However, should you decide you want to upgrade in the future, you can expand your Performa's RAM, hard drive storage, and even microprocessor to keep step with improvements in technology (such as the hot new PowerPC chip). Adding another hard drive, scanner, or CD-ROM drive is as simple as plugging one into a socket in back of the computer.

## A COMPLETE COMPUTER SYSTEM:



- Up to 16 top-of-the-line software programs
- Built-in or optional CD-ROM drive
- Fax/modem
- Color monitor
- Keyboard and mouse
- Built-in digital sound and speaker(s)
- One year of in-home service, lifetime toll-free help, and a three year warranty

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, and having modified the order in several respects, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Apple Computer, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its offices and principal place of business located at One Infinite Loop, in the City of Cupertino, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

*It is ordered*, That respondent, Apple Computer, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any computer hardware product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the availability of any microprocessor upgrade product.

II.

*It is further ordered*, That respondent, Apple Computer, Inc. a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any computer hardware product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product is currently upgradeable, unless at the time such representation is made, the upgrade is then available, in reasonable quantities to the public, given good-faith projections of anticipated demand.

III.

*It is further ordered*, That respondent, Apple Computer, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any microprocessor upgrade product that incorporates a new logic board as part of the upgrade product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall not represent that such product is an "upgrade," in any manner, expressly or by implication, unless it discloses, clearly and prominently, and in close proximity to the

representation, that a new logic board is a component of the upgrade product.

IV.

A. Within fourteen (14) days of the date of service on respondent of this order, respondent shall publish notice of this redress provision in a nationally circulated newspaper. This notice shall be in the form set out in Appendix A.

B. Within ten (10) days of the date of service on respondent of this order, respondent shall compile:

1. A mailing list containing the name and last known address of each consumer who purchased a Performa 550, Macintosh LC 550, or Performa 560 computer in the United States or in a territory of the United States on or after April 1, 1994; and

2. A mailing list containing the name and last known address of each consumer who purchased a PowerPC upgrade for a Performa 550, Macintosh LC 550, or Performa 560 computer in the United States or in a territory of the United States.

C. Respondent shall compile the lists required by Parts IV.B.1 and IV.B.2 from all customer service records under its control, including, but not limited to, registration cards, telephone logs, electronic mail logs, and written correspondence.

D. Within fifteen(15) days of the date of service of this order, respondent shall send via first class-mail, postage prepaid, a notice in the form set forth in Appendix B to this order, to all Performa 550, Macintosh LC 550, or Performa 560 purchasers listed on the mailing list required by Part IV.B.1. Respondent shall send the items set forth in Appendix B via electronic mail to any purchaser for whom respondent has only an electronic mail address. No information other than that contained in Appendix B shall be included. No additional materials, other than a postage pre-paid envelope for return of the offer form, shall be transmitted therewith.

E. The envelope containing the items set forth in Appendix B shall be in the form set forth in Appendix C to this order. For each mailing returned by the U.S. Postal Service as undeliverable for which respondent thereafter obtains a corrected address, respondent shall, within fifteen (15) business days after receiving the corrected address, send the items set forth in Appendix B to the corrected address.

F. Any consumer who, within seventy-five (75) days of the date of service of this order, returns to respondent both: 1) the form contained in Appendix A or Appendix B; and 2) payment in the amount of five hundred and ninety-nine (599) dollars, will be eligible to receive a PowerPC Upgrade Kit, or its equivalent. Apple will not be required to honor any request that is postmarked after the seventy-fifth day.

G. Respondent shall send, delivery charges prepaid, the PowerPC Upgrade Kit (or product equivalent) by common carrier appropriate to the fragility of the product, within ninety (90) days of the date of service of this order.

H. If respondent chooses to provide a product equivalent to the PowerPC Upgrade Kit to some consumers, those consumers will be chosen at random.

I. Respondent shall extend the warranty on the Performa 550, Macintosh LC 550, and Performa 560 to include all parts and labor charges necessary for installation of a PowerPC Upgrade Kit. Within thirty (30) days of the date of service of this order, respondent shall arrange for its authorized service locations to perform this installation. Respondent shall also provide each location with any installation instructions that they might not otherwise possess which are unique to the installation of a PowerPC Upgrade Kit.

J. Within fifteen (15) days of the date of service of this order, respondent shall send via first class-mail, postage prepaid, a notice in the form set forth in Appendix D to this order to each purchaser listed on the mailing list required by Part IV.B.2. No information other than that contained in Appendix D shall be included. No additional materials, other than a postage pre-paid envelope for return of the offer form, shall be transmitted therewith. Respondent shall send seven hundred and seventy-six (776) dollars to each consumer who, within seventy-five (75) days of service of this order, returns the form contained in Appendix D and either: (1) has previously submitted the registration card included in the PowerPC upgrade; or (2) provides reasonable proof of purchase of the PowerPC upgrade.

K. The envelope containing the items set forth in Appendix D shall be in the form set forth in Appendix E to this order. For each mailing returned by the U.S. Postal Service as undeliverable for which respondent thereafter obtains a corrected address, respondent shall, within fifteen (15) business days after receiving the corrected address, send the items set forth in Appendix D.

L. Respondent shall adequately staff an 800 number to answer questions from any consumer who receives a notice described in this redress provision, and any questions resulting from the publication of the notice described in Part III.A.

M. Within two hundred forty (240) days of the date of service of this order, respondent shall furnish to Commission staff the following:

1. In computer readable form and in computer print out form, the following:

a. A list of the names and addresses of all purchasers who obtain a PowerPC Upgrade Kit (or the equivalent) pursuant to this order;

b. A list of the names and addresses of all recipients of rebate checks;

c. A copy of the records used to identify these purchasers or recipients; and

d. A description of what respondent sent to each purchaser or recipient (including the check number if applicable) and the mailing date of every upgrade or rebate sent.

2. Copies of all notices returned to respondent as undeliverable (previously described in Parts IV.E and IV.K of this order); and

3. All other documents and records evidencing efforts made and actions taken by respondent to identify, locate, contact and provide rebates or upgrades to consumers.

N. For the purposes of this Part, "PowerPC Upgrade Kit" includes a 575 logic board, an upgrade card, four megabytes of RAM, Macintosh System 7.5 Operating System software, the most recent version of Claris Works for PowerPC, and a coupon for free installation of the hardware components of the PowerPC Upgrade Kit. The term "equivalent" means a computer based on the PowerPC microprocessor along with all the hardware necessary to supply a Performa 550, Macintosh LC 550, or Performa 560 owner with a complete computer system, including but not limited to a comparable keyboard and monitor. The term "consumer" includes an educational institution or any other organization.

V.

*It is further ordered*, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

VI.

*It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the company such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VII.

*It is further ordered*, That respondent, and its successors and assigns, shall deliver a copy of this order to all current and future principals and directors; to all current and future officers and managers with responsibilities or duties affecting compliance with the terms of this order; and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of five (5) years from the date of issuance of this order, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

*It is further ordered*, That this order will terminate on August 18, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging

any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IX.

*It is further ordered*, That respondent shall, within sixty (60) days from the date of service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission.[1]

APPENDIX A

[Newspaper Notice]

NOTICE TO PURCHASERS OF APPLE PERFORMA 550, MACINTOSH LC 550 AND PERFORMA 560 COMPUTERS:

IF YOU PURCHASED AN APPLE PERFORMA 550, A MACINTOSH LC550 OR A PERFORMA 560 COMPUTER ON OR AFTER APRIL 1, 1994, YOU ARE ENTITLED TO PURCHASE A POWERPC UPGRADE KIT OR ITS EQUIVALENT FOR THE SUM OF $599.00.

When we sold you your Apple computer, we advertised that is was "Ready for PowerPC upgrade." While a PowerPC upgrade was

[1] Prior to leaving the Commission, former Commissioner Varney registered her vote in the affirmative for issuing the complaint and decision and order in this matter.

subsequently offered for these models, the Federal Trade Commission ("FTC") and Apple have examined the representations that Apple made in connection with the sales of these models. While Apple believes that the upgrade representations were appropriate, customer satisfaction is our highest priority and, to this end, we have reached a settlement with the FTC that gives purchasers of these computers who would like to upgrade their computers an opportunity to secure a PowerPC upgrade at an attractive price.

For a limited time, Apple is offering its Performa 550/560 and Macintosh LC 550 customers a PowerPC upgrade kit for $599. This upgrade kit will include the components necessary to make the PowerPC upgrade, and will also include an additional 4 megabytes of RAM. In addition, the kit will contain System 7.5 (the operating system for the PowerPC), and a PowerPC upgrade for Claris Works. Included in the upgrade kit will be a coupon for the installation of the hardware components of the upgrade at no additional cost to you.

To take advantage of this offer, please fill out the information on the attached form and return it, along with a payment in the amount of $599. You may wish to make a copy of the form for your records. Upon receipt of payment and a properly completed form, Apple will ship the upgrade kit directly to you within approximately 90 days.

For customers who purchased a PowerPC upgrade for their Performa 550/560 or Macintosh LC 550 prior to [date of service of order], Apple is offering a cash rebate upon certification and proof of purchase. For additional information on this rebate offer, please contact Apple at the toll-free number noted below.

Please note that these offers are being made for a limited time only. To receive an upgrade kit at this price, customers must respond with payment and a properly completed form, postmarked no later than [70 days from date of publication]. You should also note that this upgrade opportunity is only available to customers who purchased Performa 550/560 and Macintosh LC 550 computers after April 1, 1994.

Should you have any questions regarding this upgrade offer, please call 1-800- ___-____

APPLE COMPUTER, INC.

- - - -

I am the purchaser of a Performa 550/ Performa 560/ Macintosh LC 550 (circle the correct model number) computer. I understand that I must have purchased my computer after April 1, 1994 to participate in this offer and that I must include the serial number of my computer with my order. I would like to order a PowerPC Upgrade Kit. Please deliver my purchase to the following address:

NAME: _____
STREET ADDRESS: _____
CITY AND STATE: _____ ZIP CODE: _____

_____ My check for $599.00 is enclosed (make checks payable to Apple Computer, Inc.)

__ Please charge my ____ Visa __ MasterCard __ American Express

_____ _____
Credit Card Number Expiration Date (Month/Year)

CREDIT CARD HOLDER: PLEASE PROVIDE THE FOLLOWING INFORMATION:

NAME: _____
BILLING ADDRESS_____
ZIP CODE:____ DAYTIME TELEPHONE NUMBER:_____

I hereby certify that I bought an Apple Performa 550, Performa 560 or Macintosh LC 550 in_____ (month you purchased your computer), _____(year you purchased your computer). The serial number of my computer is _____ .

DATED:_____, 1997.

_____
Signature

APPENDIX B

[Apple Computer, Inc. Letterhead]
[Date]

Re: Performa 550/560/Macintosh LC 550 Upgrade Offer

Dear [Customer Name]:

Our records show that during 1994 or 1995, you purchased a Performa 550, a Macintosh LC 550 or a Performa 560 from Apple Computer, Inc.

When we sold you your Apple computer, we advertised that it was "Ready for PowerPC upgrade." While a PowerPC upgrade was subsequently offered for these models, the Federal Trade Commission ("FTC") and Apple have examined the representations that Apple made in connection with the sales of these models. While Apple believes that the upgrade representations were appropriate, customer satisfaction is our highest priority and, to this end, we have reached a settlement with the FTC that gives purchasers of these computers who would like to upgrade their computers an opportunity to secure a PowerPC upgrade at an attractive price.

For a limited time, Apple is offering its Performa 550/560 and Macintosh LC 550 customers a PowerPC upgrade kit for $599. This upgrade kit will include the components necessary to make the PowerPC upgrade, and will also include an additional 4 megabytes of RAM which will allow the PowerPC chip to operate effectively. In addition, the kit will contain two key software packages: System 7.5, the operating system for the PowerPC; and the PowerPC upgrade for Claris Works. Included in the upgrade kit will be a coupon which will cover the cost of installing the upgrade's hardware components. Upon receiving your upgrade kit, you will only need to take your computer, the upgrade kit and the upgrade coupon to your local authorized Apple dealer, who will install the hardware for you at not additional cost.

To take advantage of this offer, please fill out the information on the enclosed form and return it, along with a payment in the amount of $599 in the enclosed envelope or in an envelope addressed to Apple Computer, Inc. [address] You may wish to make a copy of the form for your records. Upon receipt of payment and a properly completed form, Apple will ship the upgrade kit directly to you within approximately 75 days.

Please note that this offer is being made for a limited time only and that to receive an upgrade kit at this price, customers must respond with payment and a properly completed form by no later than [75 days from date of service of order]. Because of the limited availability of upgrade kits, we will not be able to extend this deadline, and we will not be offering this upgrade opportunity in the future. You should also note that this upgrade opportunity is only available to customers who purchased Performa 550/560 and Macintosh LC 550 computers after April 1, 1994. Should you have any questions regarding this upgrade offer, please call our information line at 1(800) --. As always, we at Apple view customer

satisfaction as our most important product. We appreciate your choosing Apple and look forward to serving you again in the future.

Sincerely,

David Manovich
Executive Vice-President for Global Sales
Apple Computer, Inc.

---

[Form to be Enclosed with Above Letter]

RETURN THIS FORM WITH PAYMENT

I am the purchaser of a Performa 550 / 560 / Macintosh LC 550 (circle the correct model number) computer. I understand that I must have purchased my computer after April 1, 1994, to participate in this offer and that I must include the serial number of my computer with my order. I would like a PowerPC Upgrade Kit. Please deliver my purchase to the following address:

NAME: _____
STREET ADDRESS: _____
CITY AND STATE: _____
ZIP CODE: _____

____My check for $599 is enclosed (make checks payable to Apple Computer, Inc.)
___ Please charge my ___Visa _ __Master Card __American Express

_____ _____
Credit Card Number Expiration Date (Month/Year)

CREDIT CARD HOLDER: PLEASE PROVIDE THE FOLLOWING INFORMATION:
NAME: _____
BILLING ADDRESS: _____
ZIP CODE:____DAYTIME TELEPHONE NUMBER:_____

I hereby certify that I bought an Apple Performa 550, Performa 560 or Macintosh LC 550 in_____ (month you purchased your computer), _____(year you purchased your computer). The serial number of my computer is _____ .

DATED:_____, 1997.

_____
Signature

APPENDIX C

Apple Computer, Inc.

[address]

FORWARDING AND RETURN POSTAGE GUARANTEED

[ADDRESS]

ATTENTION: IMPORTANT POWERPC UPGRADE OFFER FOR YOUR PERFORMA 550, MACINTOSH LC 550, OR PERFORMA 560 COMPUTER INSIDE

APPENDIX D

[Apple Computer, Inc. Letterhead]
[Date]
Re: Performa 550/560/Macintosh LC 550 Upgrade Rebate
Dear [Customer Name]:

Our records show that during 1994 or 1995, you purchased a PowerPC upgrade for either a Performa 550, a Macintosh LC 550 or a Performa 560 computer.

When we sold you your Apple computer, we advertised that it was "Ready for PowerPC upgrade." For the past several months, the Federal Trade Commission ("FTC") and Apple have examined the upgrade representations that Apple made in connection with the sales of these models. While Apple believes that the upgrade representations were appropriate, customer satisfaction is our highest priority and, to this end, we have reached a settlement with the FTC which will give purchasers of these computers who have not yet upgraded their computers an opportunity to secure a PowerPC upgrade at an attractive price.

Both we and the FTC believe that it is appropriate and fair to provide customers who have already purchased a PowerPC upgrade a cash rebate in order to put them on an equal footing with customers taking advantage of the new upgrade offer. Accordingly, we would ask that you fill out the enclosed form, verifying that you did, in fact, purchase a PowerPC upgrade for a Performa 550, a Macintosh LC 550 or a Performa 560 computer. Upon receipt of your completed form and proof of purchase, Apple will mail you a check in the amount of $776 to the address designated on your form. (Proof of purchase is not required for customers who filled out and mailed to Apple the registration card included in the PowerPC upgrade). Please

note that this offer is being made for a limited time only and that to receive a cash rebate qualified customers must respond with a completed form and proof of purchase by no later than [75 days from date of service of order]. Should you have any questions regarding this rebate offer, please call our information line at 1(800) --.

As always, we at Apple view customer satisfaction as our most important product. We appreciate your choosing Apple and look forward to serving you again in the future.

Sincerely,

David Manovich
Executive Vice-President for Global Sales
Apple Computer, Inc.

---

[Form to be Enclosed with Above Letter]

RETURN THIS FORM TO RECEIVE REBATE
(AN ENVELOPE IS ENCLOSED FOR YOUR CONVENIENCE)

My name is_____. I purchased a PowerPC upgrade for a Performa 550 / 560 / Macintosh LC 550 computer (circle the correct model number). I understand that Apple is prepared to provide a rebate of $776.00 for those who purchased PowerPC upgrades for these computers and that to be entitled to the rebate, customers must have either registered the upgrade with Apple at the time of purchase or now provide proof of purchase.

Please Check One:

____ I previously filled out and mailed the registration card that accompanied my Power PC upgrade to Apple Computer, Inc.

____ I did not fill out the registration card when I received my PowerPC upgrade, but I have enclosed proof-of-purchase (receipt, canceled check, credit card charge, or original packing list or original label from PowerPC upgrade box).

Please deliver my rebate check to the following address:

NAME:

STREET ADDRESS:

CITY/STATE/ZIP

_____

Signature

APPENDIX E

Apple Computer, Inc.

[address]

FORWARDING AND RETURN POSTAGE GUARANTEED

[Address]

ATTENTION: CASH REBATE OFFER ENCLOSED FOR POWERPC UPGRADE PURCHASERS

IN THE MATTER OF

# ALDI, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FAIR CREDIT REPORTING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3764. Complaint, Sept. 5, 1997--Decision, Sept. 5, 1997*

This consent order requires, among other things, the Illinois-based grocery chain to comply with the provisions of the Fair Credit Reporting Act requiring the consumers to be notified when they are denied credit, insurance or a job based in whole or in part on information in their credit report and requiring the denying company to provide the name and address of the consumer reporting agency that supplied the report.

*Appearances*

For the Commission: *John Hallerud* and *C. Steven Baker.*

For the respondent: *Keith Reed, Seyfarth, Shaw, Fairwether & Geraldson,* Chicago, IL.

## COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Aldi, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

### DEFINITIONS

For the purposes of this complaint, the following definitions are applicable. The terms *"consumer," "consumer report,"* and *"consumer reporting agency"* shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d) and 1681a(f).

PARAGRAPH 1. Respondent Aldi, Inc. is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Illinois, with its office and principal place of business located at 1200 N. Kirk Road, Batavia, Illinois.

PAR. 2. Respondent, in the ordinary course and conduct of its business, has used information in consumer reports obtained from consumer reporting agencies in the consideration, acceptance, and denial of applicants for employment with respondent.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent, in the ordinary course and conduct of its business, has denied applications or rescinded offers for employment with respondent based in whole or in part on information supplied by a consumer reporting agency, but has failed to advise consumers that the information so supplied contributed to the adverse action taken on their applications or offers for employment, and has failed to advise consumers of the name and address of the consumer reporting agency that supplied the information.

PAR. 5. By and through the practices described in paragraph four, respondent has violated the provisions of Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681m(a).

PAR. 6. By its aforesaid failure to comply with Section 615(a) of the Fair Credit Reporting Act and pursuant to Section 621(a) thereof, respondent has engaged in unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 615(a) of the Fair Credit Reporting Act and Section 5(a) of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Aldi, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1200 N. Kirk Road, Batavia, Illinois.

2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the terms "consumer," "consumer report," and "consumer reporting agency" shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d), and 1681a(f).

I.

*It is ordered*, That respondent Aldi, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any application for employment, do forthwith cease and desist from:

1. Failing, whenever employment is denied either wholly or partly because of information contained in a consumer report from a consumer reporting agency, to disclose to the applicant for employment at the time such adverse action is communicated to the applicant (a) that the adverse action was based wholly or partly on information contained in such a report and (b) the name and address of the consumer reporting agency making the report. Respondent shall not be held liable for a violation of Section 615(a) of the Fair Credit Reporting Act if it shows by a preponderance of the evidence that at the time of the alleged violation it maintained reasonable procedures to assure compliance with Section 615(a) of the Fair Credit Reporting Act.

2. Failing, within ninety (90) days after the date of service of this order, to mail two (2) copies of the letter attached hereto as Appendix A, completed to provide the name and address of the consumer reporting agency supplying the report to each applicant who was denied employment by Aldi, Inc. between January 1, 1994, and the date this order is issued, based in whole or in part on information contained in a consumer report from a consumer reporting agency, such copies of the letter to be sent first class mail to the last known address of the applicant that is reflected in respondent's files, and accompanied by a copy of the Federal Trade Commission brochure attached hereto as Appendix B, copies of which are to be provided by respondent. Copies of the letters attached as Appendix A need not be sent to any applicant who is denied employment with respondent during the time period specified above if the applicant's application file clearly shows that respondent Aldi Inc. has previously given the applicant notification that complies in all respects with the provisions of paragraph I.(1) of this order.

II.

*It is further ordered*, That respondent and its successors and assigns shall, for five (5) years from the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, documents demonstrating compliance with the requirements of Part I of this order, such documents to include, but not be limited to, all employment evaluation criteria relating to consumer reports, instructions given to employees regarding compliance with the provisions of this order, all notices or a written or electronically stored notation of the description

of the form of notice and date such notice was provided to applicants pursuant to any provisions of this order, and records of all applicants for whom consumer reports were obtained for whom offers of employment are not made or have been withheld, withdrawn, or rescinded based, in whole or in part, on information contained in a consumer report.

III.

*It is further ordered*, That respondent and its successors and assigns shall, for five (5) years from the date of issuance of this order, deliver a copy of this order at least once per year to all persons responsible for the respondent's compliance with Section 615(a) of the Fair Credit Reporting Act.

IV.

*It is further ordered*, That respondent and its successors and assigns shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation that may affect compliance obligations arising under this order, including, but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that with respect to any proposed change in the corporation about which respondent learns less than thirty days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

*It is further ordered*, That respondent and its successors and assigns shall, within sixty (60) days of the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VI.

*It is further ordered*, That this order will terminate on September 5, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

Dear Employment Applicant:

Our records show that you applied for employment at Aldi, Inc., at some time after January 1, 1994. In assessing your job application, in which you authorized us to check your credit record, our decision may have been based, at least in part, on information obtained from the credit bureau identified below:

_____

[NAME OF CONSUMER REPORTING AGENCY]

_____

[ADDRESS]

_____

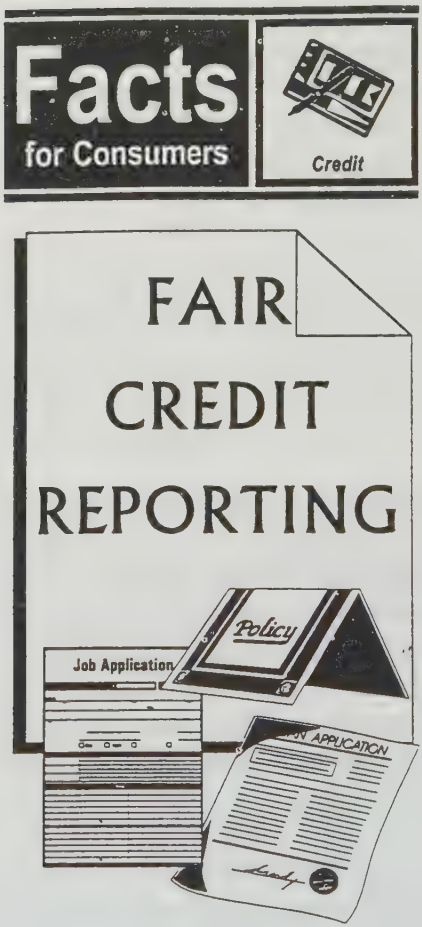
It is important for you to know that a federal law, the Fair Credit Reporting Act, gives persons who are denied employment the right to know if the denial was based, in whole or in part, on information supplied by a consumer reporting agency, commonly known as a "credit bureau." If so, the name and address of the credit bureau must be disclosed to the applicant.

Information in your credit report may have led us, at least in part, to deny your application. Based on our actions you are entitled to a free disclosure of your credit report if you contact the credit bureau within (30) days. An extra copy of this notice is enclosed so that you may give it to the agency when you request to review your file.

A brochure explaining your rights under the federal credit laws is enclosed. If you want more information about your rights, write to the Federal Trade Commission, Correspondence Branch, Washington, D.C. 20580.

Thank you.

APPENDIX B




Federal Trade Commission
Bureau of Consumer Protection
Office of Consumer & Business Education
(202) 326-3650

September 1997

IN THE MATTER OF

# ICON HEALTH AND FITNESS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3765. Complaint, Sept. 9, 1997--Decision, Sept. 9, 1997*

This consent order requires, among other things, the Utah-based advertisers and distributors of Cross Walk Treadmills to substantiate future weight-loss, calorie-burning or fat-burning claims or benefits of any exercise equipment. In addition, the consent order requires that the testimonials in the respondents' advertising either represent the typical experience of users, or include disclosures of the generally expected results.

## *Appearances*

For the Commission: *Laura Fremont* and *Jeffrey Klurfeld.*

For the respondents: *David Seidl, Miles & Stockbridge,* Baltimore, MD. and *Brad Bearson*, in-house counsel, Logan, UT.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Icon Health and Fitness, Inc., IHF Holdings, Inc., and IHF Capital, Inc., corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Icon Health and Fitness, Inc. is a Delaware corporation with its principal office or place of business at 1500 S. 1000 W., Logan, Utah.

2. Respondent IHF Holdings, Inc. is a Delaware corporation with its principal office or place of business at 1500 S. 1000 W., Logan, Utah.

3. Respondent IHF Capital, Inc. is a Delaware corporation with its principal office or place of business at 1500 S. 1000 W., Logan, Utah.

4. Respondents have advertised, labeled, offered for sale, sold, and distributed exercise products to the public, including the "Proform Cross Walk Treadmill," the "Proform Cross Walk Plus," and the "Proform Cross Walk Advantage" ("Cross Walk Treadmill[s]"), which are motorized treadmills.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

6. Respondents have disseminated or have caused to be disseminated advertisements for Cross Walk Treadmills, including but not necessarily limited to the attached Exhibit A. This advertisement contains the following statements and depictions:

SUPER: "Erin Waite Exercises 4 times per week on her CROSSWALK."
Consumer endorser: "From the time I first started using the Crosswalk I have lost almost 30 pounds."

SUPER: "Barbara Veltrie Exercises 5 times per week on her CROSSWALK."
Consumer endorser: "I've taken off over 60 pounds now."

SUPER: "Tim Rose Michelle Rose Exercise 3 times per week on their CROSSWALK."
Consumer endorser (Michelle Rose): "I went from a size 12 down to a size 8."
SUPER: "Erin Waite Exercises 4 times per week on her CROSSWALK."
Consumer endorser: "About the time I got to a size 4, my secretaries at work started asking me, `What are you doing?' And I told them and both of my secretaries have bought one also."

Narrator: "Work more muscles, burn calories faster, reach your target heart rate more quickly -- all in a low impact workout that burns up to 1,100 calories an hour."

Narrator: "Burn up to 1100 calories per hour!"
(Exhibit A)

7. Through the means described in paragraph six, respondents have represented, expressly or by implication, that users of the Cross Walk Treadmill will burn calories at a rate of up to 1,100 per hour under conditions of ordinary use.

8. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph seven, at the time the representation was made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph seven, at the time the representation was made. Respondents obtained the 1,100 calorie figure from a study that measured the rate of calorie burn of persons who had exercised to the point of exhaustion. Such "maximal exertion" tests are not appropriate measures of the number of calories people can burn during ordinary exercise because they measure calorie burn at a level

of exercise intensity that is unsustainable for more than an extremely short period of time. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. Through the means described in paragraph six, respondents have represented, expressly or by implication, that testimonials from consumers appearing in advertisements for the Cross Walk Treadmill reflect the typical or ordinary experience of members of the public who use the product.

11. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph ten, at the time the representation was made.

12. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph ten, at the time the representation was made. Therefore, the representation set forth in paragraph eleven was, and is, false or misleading.

13. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

Proform Fitness
"Crosswalk Line"[1]

[FADE IN DISCLAIMER:] This program is a paid advertisement presented by Proform Fitness Products, Inc.
{Interior of exhibit hall}
[Indistinct sounds, the rustle of milling bodies, muted voices, the cacophony of musical instruments warming up.]
KELLY: Hold it, hold it. Okay, everyone, let's go again in five.
[HOUSE LIGHTS UP... revealing the interior of a LARGE EXHIBITION HALL, as we realize we're in rehearsal for a much larger show to come.]
KELLY: Joel, if you wanted a part, all you had to do was ask.
JOEL: Sorry Kelly. I just need to borrow this one machine.
KELLY: Not right now you don't. I am still...
JOEL: No. No. No. I'll have it back in plenty of time for the show--

[1] Stage directions from the original transcripts provided by respondents are indicated by squared brackets ([]). Those not crucial to conveying format or presentation of the material have been deleted. Information added by Commission staff, such as superscripts or narrative that are not indicated in respondents' transcripts but do appear on the tape, are indicated by curved brackets ({}). Emphasis is as it appeared in the transcripts supplied to staff.

KELLY: Joel ... In less than 24 hours, this building is going to be filled with people and-- call me crazy-- but it seems like it might be a good idea to get through a rehearsal of the real choreography, with real machines!
JOEL: Okay, okay. It's just that Bill thinks we're gonna need another Crosswalk upstairs.
KELLY: I can relate. Hey, I'm still waiting for the extra one I asked for... That's fine. So--how's it going up there in the daylight?
JOEL: Well, we're *only* spreading the incredible new information about walking and unveiling the hottest new equipment since the Original Crosswalk.... Other than that, it's just another ho-hum Fitness Expo.
KELLY: Well, good luck-- But Joel, I still have to have this machine.
{Switch to different set} {SUPER: Peggy Fleming, Olympic Skating Champion}
PEGGY: Hi, I'm Peggy Fleming, with news that will probably surprise you as much as it did me. Did you know that the latest research shows that walking is the most efficient method for burning fat calories and losing weight? It's true. And to take advantage of that fact... plus all the benefits of total body fitness... nothing works like the Proform Crosswalk. In fact, it's been such a phenomenal success, that now Proform has created two new Crosswalk models, which we'll be introducing in just a minute.
{SUPER: BURN MORE FAT} I've seen all the ways the Crosswalk can help you burn more fat...
{SUPER: SHAPE & TONE} shape and tone your body...
{SUPER: REDUCE STRESS} reduce stress...
{SUPER: CARDIOVASCULAR IMPROVEMENT}
and build your cardiovascular system. Not to mention making the most of what little time we have for exercise these days. I wouldn't be here if I didn't believe you can have the same success.
So stay right where you are to learn how to put the news about walking....and all the versatile benefits of Crosswalking... to work for you.
{Switch to different set}
[The VIP room is a convention suite/hospitality room, where a large gathering (10+) of people are mingling. A TV monitor is positioned in one corner.]
[Three Crosswalk machines are positioned strategically around room, draped as if ready for "unveiling." Also in room are Marty Townes, V.P. Marketing for Proform, Bill Hansen, Proform Chief Engineer, and our "cast of interested information-seekers: Sue, a TV reporter; Tom, a fitness writer; Mike, an equipment buyer; and Carrie, a trainer.]
MARTY: Okay, everybody, I think we're just about ready to get started. On behalf of Proform, we'd like to thank everybody for coming here today.
I'm Marty Townes, Proform's Marketing Director...
MARTY: ... and this is Bill Hansen, our Chief Engineer.
MARTY: Now, I know the Fitness Expo doesn't start until tomorrow, but this is going to be a very big year for us.
And we'd like to give you just a sneak preview of what we humbly consider the future of home fitness.
We'd like to share with you some of the thinking behind this new line of Crosswalks.
BILL: With the original Crosswalk, we knew we had something special. We just didn't know how special.

Now, most people assume that the more you sweat, the more fat you lose.
MIKE: No pain, no gain.
MARTY: Exactly. But, the latest research shows something very different: That a consistent, moderately intense workout is actually the best method for burning fat calories and losing weight.
MIKE: You mean you don't have to kill yourself to lose weight.
[Bill moves to TV monitor]
BILL: Well, that's right. But even more important to us than scientific findings, is that there's proof right here that real people are getting real results with the Crosswalk. Now, here are some interviews with actual Crosswalk owners.
[CUT to Monitor, where Bill has cued up consumer testimonials.]
[DISSOLVE to full screen consumer testimonials.]
{SUPER: Erin Waite Exercises 4 times per week on her CROSSWALK.}
ERIN WAITE: From the time I first started using the Crosswalk I have lost almost 30 pounds.
SUPER: Pat Herman
Exercises 3 times per week on her CROSSWALK.
PAT HERMAN: This is the first piece of equipment we've ever had that has really motivated me.
SUPER: Barbara Veltrie
Exercises 5 times per week on her CROSSWALK.
BARBARA VELTRIE: I've taken off over 60 pounds now.
SUPER: Elaine Williams
Exercises 10 times per week on her CROSSWALK.
ELAINE WILLIAMS: When you get to 71 like I am and your doctor asks you to exercise or walk mainly. And in the wintertime it's very difficult sometimes on account of the snow and the rain and you don't feel like you want to do that. You get on the CrossWalk for 30 minutes. Oh and you feel like... Well, I probably feel like I am about 40.
SUPER: Tim Rose
Michelle Rose Exercise 3 times per week on their CROSSWALK.
MICHELLE ROSE I went from a size 12 down to a size 8.
SUPER: Erin Waite Exercises 4 times per week on her CROSSWALK.
ERIN WAITE: About the time I got to a size 4, my secretaries at work started asking me, What are you doing? And I told them and both of my secretaries have bought one also.
SUPER: Pat Herman
Exercises 3 times per week on her CROSSWALK.
PAT HERMAN: That's why everyone should have one. I'm serious.
{Switch back to "VIP" room set}
BILL: It's very clear that the Crosswalk phenomenon is growing. Fast. We need to stay one step in front of the momentum. And that's what led to Crosswalk...the Next Generation.
BILL: ...the Proform Crosswalk Plus... additional features and convenience in a sleek, streamlined design ...
MARTY: ...and our top of the line... the Crosswalk Advantage... precision engineering and the latest technology...
BILL: ...two new models to join our best-selling original Crosswalk ...in a complete Crosswalk line.

SUE [TV REPORTER, aside to Mike]: So...they're like a sidewalk that never ends
MIKE: [aside to Sue] Or gets rained on....
SUE: These are all motorized treadmills. Correct?
MARTY: That is such an important question and the answer is yes, because only a motorized treadmill will keep you at a consistent pace, within a comfortable fat burning zone. In fact, the Crosswalk burns over 20% more fat calories than a manual treadmill.
BILL: Unlike regular walking, or regular treadmills, the Crosswalk gives you quicker results, and overall better muscle toning, because the resistance arms involve your upper body, as well.
MARTY: Listen. I'm sure you'll have lots of other questions after you've seen the machines in action. So go ahead and spend some time with them now... Bill and I will be ready with answers.
BILL: Joel. Joel. How we doing on getting another machine up here?
JOEL: I'm... working on it.
BILL: Good, good. We need to get it up here. I've a few more people than I expected ...
JOEL: I'll get right on it. Thanks.
[CUT to Marty approaching Sue, who is watching a model working out on the Crosswalk Advantage.]
MARTY: Hi. We haven't met yet. I'm Marty Townes.
[Sue shakes her hand. CUTAWAYS to close-up, model demonstrating Crosswalk Advantage]
SUE: Hi, Marty. Sue Meyers, Cable Fit Network.
MARTY: Hi, Sue.
SUE: So -- a whole line of Crosswalks, huh? You really think there's going to be that kind of demand?
MARTY: Oh, not going to be. There already is. Do you know that we've sold nearly half a million of the original Crosswalks to date. But what's really very exciting to us is that our customers are telling us it's making a huge impact...not only in their fitness, but in their lives. So it seemed natural to just expand out the line and offer more options.
SUE: So you feel all the recent news about walking and fat burning is just going to fuel the fire?
MARTY: Exactly. In fact, I'd like to show you something ...
[They head toward TV monitor] [CUT to Bill showing Mike the Crosswalk Plus.]
BILL: So what do you think, Mike?
MIKE: It's beautiful. I hope you didn't change everything.
BILL: Actually, the new Crosswalks keep all the important features of the original.... like the Pro-Tech key for safety, so no can start or stop the machine accidentally... ...also, the dual action resistance arms for a total body workout and better muscle toning electronic feedback, which tracks your progress... and, of course, our quality construction, with our limited ten-year warranty...
MIKE: It wouldn't be a Crosswalk without that...
BILL: Oh. But, here's a new design feature for this year. You see this? It's a speed control. It's built right into the handle.
MIKE: Hey, that's great--you don't have to stop and adjust it ....
BILL : .... and it gives you safe, smooth acceleration. For those tall athletes or runners with a long stride, we also eliminated the hood on the front of the tread, so

they can really stretch out. But overall, this machine takes up less space. In fact, we streamlined the whole frame. [Bill adjusts the power incline.]
We've also added a power incline, which you can adjust without ever getting off the machine... So you can boost the intensity of your workout, and strengthen those legs.
MIKE: Yeah, I can't believe you could get all those features on a machine at this price point.
MIKE: My customers are going to love this.
[CUT to Marty and Sue at TV monitor. Dr. Upton is on monitor.]
MARTY: This is Dr. David Upton.
SUE: Oh. Hey, we quoted this guy in one of our stories about walking. Isn't he an expert on wellness?
MARTY: Uh, huh. And an author. Here, listen for yourself ...
[CUT TO MONITOR]
[Dr. Upton testimonial. DISSOLVE to full screen testimonial]
{SUPER: Dr. David Upton Exercise Physiologist/Wellness Consultant}
{If your goal is to lose weight, you have to do more than just diet. While dieting does reduce your caloric intake, it also lowers your metabolism. And it's been proven that a low metabolism won't burn off your excess fat. So to achieve that desired high fat burning metabolism, I recommend regular, brisk exercise at a constant pace, a pace that raises your heart rate, or pulse, up to your target heart rate zone, for optimum fat burning. Recent studies have shown that walking is one of the best ways to accomplish this. However, you must walk a steady rate. One way to do that is to walk on a motorized treadmill. This keeps you walking at a constant pace which gives you the most benefit from your exercise.}
{Switch back to "VIP Room" set}
SUE: Great stuff. Y'know, I also have a few technical questions, if you don't mind...
MARTY: No I don't mind...But actually...Bill would probably be better to answer those...
SUE: Hi, I'm Sue Meyers.
BILL: How do you do?
SUE: Oh, I just have a few questions about the design of the Crosswalk Advantage.
BILL: Great. Why don't you come over with me and maybe I can answer them for you.
{SUPER: This program is a paid advertisement presented by Proform Fitness Products, Inc.} [SUPER: To be continued ....] {Switches to narrated portion}
{SUPER: LOSE WEIGHT}
FEMALE VOICE [voiceover] Lose weight...
{SUPER: TONE UP} Tone up ...
{SUPER: LOOK GREAT} Look great ...
ANNOUNCER [voiceover]: With the CrossWalk Line of motorized treadmills. Each CrossWalk gives you ...
{SUPER: TOTAL BODY EXERCISE}
FEMALE VOICE: Total body exercise ...
ANNOUNCER: While your lower body works at a steady pace, the resistance arms tone and firm your upper body. Work more muscles, burn calories faster, reach your target heart rate zone more quickly--all in a low impact workout that burns up to 1,100 calories an hour.

{SUPER: MOTIVATIONAL FEEDBACK}
MALE VOICE: Motivational feedback. . .
ANNCR: Stay motivated. The electronic display shows you how many calories you're burning, how far you've gone, how close you are to your goals, and if you're in your target heart rate zone.
{SUPER: MOTORIZED CONTROL}
FEMALE VOICE: Motorized control . . .
ANNCR: . . . The CrossWalk motorized belt puts you in total control. You select your own pace. And the motorized belt keeps you at that smooth consistent pace for maximum fat burn.
{SUPER: SAFETY}
FEMALE VOICE: . . . Safety . . .
ANNCR: Insert the Prot-Tech safety key to start your workout -- remove it when you're done. Your CrossWalk won't run without it.
{SUPER: VERSATILITY}
FEMALE VOICE: . . . Versatility . . .
ANNCR: Count on the support of Proform, the leading manufacturer of home fitness equipment in the world. That means a 10-year limited warranty on every CrossWalk, plus the backing of Proform's nationwide service network, ready whenever you need it!
{SUPER: WALK}
FEMALE VOICE: Walk.
{SUPER: RUN} Run.
{SUPER: TOTAL BODY AEROBIC EXERCISE} Total body aerobic exercise. Burn fat. Lose weight. Choose your CrossWalk.
ANNCR: {CAPTION: (lists features of Original Crosswalk)}
The original CrossWalk; outstanding value and proven success with over half a million sold. Its quiet, one-and-a-half horsepower motor keeps you at a steady, fat burning pace. Simple controls make operating the CrossWalk as easy as walking.
{CAPTION: $49.95, For 10 Months, $499 plus $75, Shipping & Handling}
All for only $49.95 a month! {CAPTION: (lists features of Crosswalk Plus)}
The CrossWalk Plus. Its expanded hoodless walking deck provides over 20% more walking space than the Original, yet it actually takes up less space! The 2-horsepower motor delivers smooth response and solid acceleration. Finger tip speed control and Power Incline let's you burn more calories by increasing workout intensity without interrupting your workout.
{CAPTION: $49.95, For 10 Months, $499 plus $75, Shipping & Handling}
The spacious, convenient CrossWalk Plus... only $49.95 a month!
{CAPTION: (lists features of Crosswalk Advantage)}
The CrossWalk Advantage: A supersize deck give you one of the largest walking belts of any treadmill on the market. The 2 1/2 horsepower motor provides quiet, durable, smooth operation. The cushioned deck ensures a low impact workout for your ankles, knees, hips and back. Simple but advanced electronics provide four easy to use, pre-programmed workouts. And with speed and incline controls right at your finger tips you can easily vary your workout intensity.
{CAPTION: $49.95, For 10 Months, $499 plus $75, Shipping & Handling}
Our most advanced CrossWalk, for only $49.95 a month!
SUPER: Call Now for FREE Brochure & Video

For a free brochure and video on the CrossWalk line, call the number on your screen now! {SUPER: PROFORM PROMISE
If within 30 days you don't feel better, look better, and see the results you want, just return it for a full refund. Guaranteed! (Less $75.00 S&H)}
And remember the Proform promise -- the CrossWalk is the finest piece of fitness equipment you can buy. If within 30 days you don't feel better, look better and see the results you want, just return it for a full refund. Guaranteed!
{SUPER: CALL NOW}
FEMALE VOICE: Call now.
ANNCR: Call now! And discover the benefits of CrossWalk!
{Switch to different set} [SUPER: Peggy Fleming, Olympic Gold Medalist]
PEGGY: I know that no two people have exactly the same fitness needs or goals. That's one of the reasons I've been so impressed with these Crosswalks.
[CUTAWAYS to models demonstrating] {SUPER: BURN MORE FAT}
If you want a moderate intensity workout for fat burning... just set your speed. The electronic console tells you when you've reached your optimum level and achieved your goals. {SUPER: CARDIOVASCULAR IMPROVEMENT}
Or, just increase the speed if you want a great cardiovascular workout.
{SUPER: TOTAL BODY WORKOUT} Add the resistance arms to get your whole body involved and reach your maximum total calories burned.
[CUT back to Peggy]
The possibilities for variations--and results-- are almost endless.
I think you can see why the Proform Crosswalk is the workout equipment I've chosen to be associated with. Its quality is legendary, which is easy to understand when you know it's made by Proform, the leader in home exercise equipment. Proform is the largest manufacturer of treadmills in the world.
Who better to bring the benefits of walking home to all of us? And for more on those benefits, stay right where you are.
{Switch to exhibit hall set}
KELLY: [to an assistant] Okay, thanks..Yes, we can hang that later... Alright people... Eighteen hours and counting until the entire Fitness Expo moves in here to watch you strut your stuff... And Corrigan, I want these Crosswalks to shine.
PROP ASSISTANT: Hey Kelly, here's that extra machine you wanted.
KELLY: Oh, great. Just set it up right there.
[He takes box off truck and pulls out the folded Crosswalk. He looks perplexed.]
PROP ASSISTANT: Okay..... so..... how are we supposed to put it together?
[With an amused look, Kelly walks over to the Crosswalk and in one simple move, turns the handle, and pulls the handlebars up into place. Without saying a word, she smugly looks over at him, and goes back to what she was doing.]
1. PROP ASSISTANT: You're kidding, right?..... That's all there is to it...?
{Switch to "VIP Room" set}
BILL: Really, it's that simple ....
[PULL BACK to reveal he is showing the same easy handling feature on the Crosswalk Plus to TOM (the writer), only Bill is folding it back down, to show easy storage.]
TOM: Wow! You know, this is a great idea, having a preview of the new Crosswalks before the Fitness Expo starts tomorrow, 'cause its going to be crazy.
BILL: We wanted to make sure you guys knew what the real news was this year. And I don't see how the competition can top this.

TOM: Speaking of which, I heard you say something earlier about the Crosswalks being better than manual treadmills, because the Crosswalk is motorized. I'll tell you, there's a lot of people out there pushing manuals.
BILL: "Pushing" is exactly the right word. Because if you've ever tried to use one that's what you're doing. And they're cheaper to build. And if they were effective we'd build one ourselves. But, let me show you something.
[He moves over to TV monitor, finds tape, and puts it in. We see close-up action of manual treadmill. DISSOLVE to full screen manual treadmill demo.]
BILL [voiceover]: Okay, here we go. Most manual treadmills are set at a 12% incline. That's pretty steep. But manuals have to be set that way because they depend on your body weight and on gravity to work. When they're level, you just can't get them to go.
{Depiction of chart showing target heart rate zone during 20 minute workout using a manual treadmill}
That means you have to over-exert.... and you get tired and slow down, the manual tread slows down, too.
{Depiction of chart showing target heart rate zone during 20 minute workout using a manual treadmill and using a CrossWalk}
Between pushing too hard... and not hard enough... you're not maintaining that consistency to stay within your fat burning zone.
And remember, the key to successful weight loss is consistent, moderate exercise within your fat burning zone. Now, that's why the Crosswalk's motorized tread is so much more efficient. You can set a pace, and maintain it. In fact, a recent university study showed you can lose over 20% more fat calories on the Crosswalk than working out on a manual treadmill.
[CUT back to Bill and Tom. Sue has joined them.]
SUE: Okay, I understand why motorized treadmills are better than manuals. My question is, why are the Crosswalks so much better than stair steppers and bikes?
BILL: Well, anyone that's used a stationary bike or a stair stepper knows they're fine for the lower extremities... {SUPER: 65% of all muscles are above the waist} But 65% of our muscles are above the waist. Those kinds of machines just don't give you a total body workout. And the same can be said for most manual treadmills.
TOM: How about ski machines?
BILL: We're constantly being told how difficult ski machines are to use, especially by people that are just starting out. And remember, ski machines aren't motorized, so you're not motivated to keep up a pace that you need, to stay within your fat burning zone.
BILL: Here, why don't I let some consumers tell you about their own experiences.
[Consumer testimonials appear on monitor. DISSOLVE to testimonials full screen.]
{SUPER: Michael Ferguson Suzy Ferguson Exercise 2-4 times per week on their CROSSWALK.}
MICHAEL FERGUSON: {When I've used the CrossWalk, its made me feel good about myself. It's made me feel good physically. But more than that it's made me feel good just about life. Even though sometimes its hard work, I'm always come away feeling much better than when I started.}
{SUPER: Nancy DeJardin Exercises 5-6 times per week on her CROSSWALK.}

NANCY DEJARDIN: {Well, I exercise like a lot of people just to keep in shape and I have a stressful job and I find that the CrossWalk not only helps my energy level, but helps with my stress and helps me to sleep better.}
{SUPER: Annette Nelson Exercises 3 times per week on her CROSSWALK.}
ANNETTE NELSON: {I had a NordicTrack and I much prefer the CrossWalk because I'm able to vary my speeds with the CrossWalk and I have much more consistent workout.}
[Back to VIP Room. Sue continues listening to testimonials. Marty walks up to Bill.]
MARTY: Is it just me, or is this going extremely well?
BILL: Incredible.
MARTY: I just wish we had a few more CrossWalks. You know everyone wants to try them.
BILL: Joel's supposed to be bringing one up from downstairs.
{Switch to exhibit hall set}
[A short dance montage down on stage, dancers going through their routines on the Crosswalks.]
STAGE HAND
Stale popcorn?
KELLY: Why, of course.
{Switch to "VIP room" set}
[back to VIP room, Carrie working out on Crosswalk Advantage. She is really burning up the deck, pushing it. She has the pulse clip attached to her ear.]
MARTY: Isn't that new bigger deck great?
CARRIE: This is fantastic... how long is it anyway?
MARTY: 54 inches. And a full 18 inches wide. There's plenty of room on the Crosswalk Advantage. Another feature we've added is a Soft Stride suspension deck for extra cushioning. It helps protect your ankle, knee and hip joints.
CARRIE: That's a great feature.
MARTY: Well...oh that's right. You're a personal trainer.
CARRIE: Right.
MARTY: Then you should appreciate the two and a half horsepower motor. Solid, steady power at a range of speeds, right up to 10 mph on the Crosswalk Advantage.
CARRIE: You know, my clients need something that can keep challenging them as they improve... so they can really push their workout when they want to.
[Mike walks up]
MIKE: So this is the Advantage?
CARRIE: Would you like to try it? [She gets off. Mike gets on.]
MIKE: Thanks. Wow. That's quite a control pad.
MARTY: And it's so easy. See? You can track your speed..... time .... distance... incline...even heart rate. And, of course, it calculates the calories that you've burned. If you want to concentrate on the lower body only, you don't have to lock the arms in place. Just let go...
MIKE: Oh, that's nice.
MARTY: ...and then pick them back up anytime.
MIKE: How about automatic workouts?
MARTY: The Crosswalk Advantage has 4 pre-set routines, so you can vary your workout according to your goals. It's like having a personal trainer in your home.
MIKE: That'd be nice.

SUE: So this one has all the extras, huh?
{SUPER: This program is a paid advertisement presented by Proform Fitness Products, Inc.}
MARTY: Except for the extra cost. We've managed to price this very affordably.
[SUPER: To be continued....] {Switches to narrated portion} {SUPER: LOSE WEIGHT}
FEMALE VOICE {voiceover}: Lose weight...
{SUPER: TONE UP} Tone up ...
{SUPER: LOOK GREAT} Look great ...
ANNOUNCER: No other fitness machines offer the versatility of every CrossWalk
FEMALE VOICE: {SUPER: TOTAL BODY EXERCISE}
Total body exercise ...
ANNCR: ... Achieve weight control more quickly by working your entire body. Get the benefit of a lower body workout by walking or running while you tone and condition your upper body with the resistance arms. Burn up to 1,100 calories per hour!
FEMALE VOICE: {SUPER: MOTORIZED PACING}
Motorized pacing ...
ANNCR: You control the pace for a full range of workouts. Unlike manual treadmills, you select the perfect speed for your fitness goals. There's no guesswork, no missing your goal because you're not at the right pace. You are in control.
{SUPER: CUSTOMIZED RESULTS}
FEMALE VOICE: Customized results ...
ANNCR: Lose weight, tone muscle, reduce stress, increase energy, or just feel better about yourself -- the CrossWalk can give you the personal results you want!
FEMALE VOICE: Three different crosswalks. Three sets of features... Three proven ways to succeed...
{CAPTION: lists features of Original Crosswalk}
ANNCR: The original CrossWalk: Smooth, quiet tread acceleration up to 8 miles per hour. Choose a moderate fat burning speed or gently increase the speed for a cardiovascular workout. And with the dual-action arms you'll reach your goals more quickly because you're using your entire body. Or just lock the arms in place for a walking-only workout.
{CAPTION: $49.95, For 10 Months, $499 plus $75, Shipping & Handling}
Flexibility and value for only $49.95 a month!
{CAPTION: lists features of Crosswalk Plus}
The new Crosswalk Plus. Advanced tread design gives you a longer stride base in a more compact frame! Vary the pace of your workout with the convenient new fingertip speed control. The exclusive Power Incline lets you increase your workout intensity: reach your target heart rate zone faster, tone and shape hips, thighs, calves and buttocks. You'll see results quicker.
{CAPTION: $49.95, For 10 Months, $499 plus $75, Shipping & Handling} Even more versatility for only $49.95 a month!
{CAPTION: lists features of Crosswalk Advantage}
The CrossWalk Advantage: Versatile speed range up to 10 miles per hour provides a moderate fat burning pace yet can challenge even the most advanced athlete. Enhanced electronics give you easy-to-read feedback to track your progress with four pre-set workouts. It's like having your own personal trainer!

{CAPTION: $49.95, For 10 Months, $499 plus $75, Shipping & Handling}
Every option... for only $49.95 a month! {SUPER: Call Now for FREE Brochure & Video} For a free brochure and video on the CrossWalk line, call the number on your screen now!
{SUPER: PROFORM PROMISE If within 30 days you don't feel better, look better, and see the results you want, just return it for a full refund. Guaranteed! (Less $75.00 S&H)}
{SUPER: CALL NOW}
FEMALE VOICE: Call now...
ANNCR: Call now! And discover the benefits of CrossWalk!
{Switches to different set}
{SUPER: Peggy Fleming, Olympic Skating Champion}
PEGGY: Walking is something that almost everyone can do--I know I enjoy going for walks in my neighborhood.
But I also know that I'd never stick with my fitness program if I didn't have my Crosswalk at home. For one thing, I don't know about your climate, but where I live the weather is never a sure thing. It's also nice to have the security of staying at home to exercise. With the Crosswalk, I can walk after dark, or at times when I might not feel as comfortable going out. I'm a mother, too. And there are lots of times when leaving the house just isn't practical. {SUPER: BURN FAT}
The Crosswalk is also incredibly versatile. You can burn fat.
{SUPER: TONE MUSCLES} You can tone muscles.
{SUPER: CARDIOVASCULAR IMPROVEMENT} You can get cardiovascular exercise.
{SUPER: REDUCE STRESS} You can even work off stress. And you can do it all, without ever leaving your home. Those are just a few of the Crosswalk's advantages. And there's lots more to come. So stay tuned for the next chapter of the Crosswalk story. {Switch to exhibit hall set}
KELLY: OK, start stretching out and we'll take it again in 5 with lights.
JOEL: Wow. This is looking really good, Kelly. H-e-e-y.... I see you got that extra machine ....
KELLY: 0-o-o-h no you don't. I still have a final rehearsal to go, and I absolutely cannot in any way, shape or form, no matter what -- have you got there?
KELLY: Hot egg rolls??... You are shameless, How about a big cup of coffee to go with it?
JOEL: Done.
KELLY: Okay. Two hours. But, as soon as you've finished upstairs, you come back down here for final rehearsal.
JOEL: It'll be here. Scout's honor.
{Switch to "VIP Room" set}
[CUT to Marty and Bill, over at the original Crosswalk, spotting him, pleased to have the extra machine.]
MARTY: Alright, Joel... Look, another treadmill...
BILL: I knew making it easy to move would come in handy.
SUE: Excuse me -- Bill, do you think I could get you to run through that new research on walking and fat loss again? Maybe one of those video tapes with Dr. Upton?
BILL: Sure. Let's take a look.
[CUT to Sue and Bill at TV monitor. Bill inserts tape.]

BILL: Well, so what do you have so far?
SUE: [reviewing notes] Well... new studies show that walking is the most effective workout for weight loss.
BILL: That's correct.
SUE: And the Crosswalk is the best way to do that, because it's motorized, so you have total control over the pace and intensity of your workout.... Correct?
[Bill nods.]
BILL: You got it.
{SUPER: 20% more fat burned}
SUE: Which is why research is proving that the Crosswalk can burn over 20% more fat calories than manual treadmills.
BILL: You got it.
{SUPER: 1100 cph, burn 1100 calories per hour}
SUE: Plus you get quicker results than regular walking, since you work your lower and upper body... and, if you want really want to push yourself, you can burn over 1100 calories an hour.
BILL: I can see you've been doing your homework.
SUE: It also offers convenience and safety-- you can workout anytime you want, in any kind of weather, right in your own home ... And, it gives you the incentive you need, with constant, electronic feedback on how you're doing.
BILL: I wouldn't add a thing.
SUE: Great. I just want to hear the tape one more time.
BILL: Sure.
[Bill starts tape. Expert testimonial comes up on monitor.] {SUPER: Dr. David Upton Exercise Physiologist/Wellness Consultant}
DR. DAVID UPTON: {I can't emphasize enough that study after study has demonstrated that to lose weight you have to burn more calories than you take in. And the more muscles you use during your workout the more calories you'll burn in the shortest period of time. Using a motorized treadmill with resistance arms lets you work all the large muscle groups in both your upper and lower body. This gives you the maximum calories burn, plus the added benefits of overall cardiovascular fitness.} [Switch to "VIP Room" set]
MARTY: You know a few years ago when we first introduced the Crosswalk...
[CUTAWAY to Crosswalk Classic]
MARTY: [voiceover] ...it was a real pioneer in home exercise equipment...the first dual-action motorized treadmill of its kind. And, as you know, the response has been tremendous. [PAN TO other Plus and Advantage]
MARTY: [voiceover] And today, with the new Crosswalks, Proform has pushed the standard for home fitness equipment even higher and made total body fitness even more accessible and more exciting.
[CUT back to Marty, gesturing to all 3 machines]
MARTY: Now, what we're doing is spreading the news about just what a powerful change the Crosswalk can make in people's lives.
MARTY: And we're hoping you'll help us with that. So thank you very much for coming. Oh, they're still rehearsing downstairs. So tomorrow when the Expo opens, I hope you'll all go down and catch the Proform Fitness Show on the main level ...
{Switch to exhibit hall set}
KELLY: Okay, this is final, full out!
[Stab in show music. Show springs to action.] {Switch to different set}

{SUPER: Peggy Fleming, Olympic Skating Champion}
PEGGY: So that's our story. But now it's your turn.
No other fitness equipment compares to the Crosswalk, for burning fat calories .... and getting a total body workout right at home. It's an important part of my life. And there have never been more reasons to make it part of yours ... Or a better time. {Switch to testimonials}
{SUPER: Val Herman Exercises 4 times per week on his CROSSWALK.}
VAL HERMAN: {The CrossWalk is the safest machine that I've ever owned ... The size is convenient and the fact that it's always there is probably the most convenient thing. It's a marvelous piece of equipment. I'd recommend it to anybody.}
{SUPER: Tracie McBeth Exercises 2-3 times per week on her CROSSWALK.}
TRACIE MCBETH: {Not only have I lost the weight and lost the inches, but I'm also gaining strength and toning my entire body up at the same time.}
{SUPER: Earl Johnson Exercises 2-3 times per week on her CROSSWALK.}
EARL JOHNSON: {Pretty soon your confidence level comes back to where you feel good about yourself and that alone is worth the price of the unit.}
{Switches to narrated portion} {SUPER: LOSE WEIGHT}
FEMALE VOICE: (voiceover) Lose weight...
{SUPER: MOTIVATION} Motivation
{SUPER: STAY FIT} Stay fit
{SUPER: SUCCESS} Success
ANNCR: Whatever your fitness goal, get there faster with the safety and convenience that only CrossWalk can offer ...
{SUPER: EASY OPERATION}
FEMALE VOICE: Easy operation ...
ANNCR: Simply adjust the arms to the resistance you want... Insert your Pro-Tech key... set your pace... and the CrossWalk gradually ramps up to the speed you set. The bright display panel tracks your progress. When you're done, remove your key... your CrossWalk is ready to store in seconds.
SUPER: SAFETY & PROTECTION
FEMALE VOICE: Safety and protection...
ANNCR: Your personal Pro-Tech key keeps the Crosswalk worry free, even in homes with young children. It won't run without the key in place, so there's no chance of accidental starting.
FEMALE VOICE: A CrossWalk for every budget...
{SUPER: EVERY BUDGET}{SUPER: EVERYBODY} A CrossWalk for every body...
{SUPER: EVERYONE} A CrossWalk for everyone...
{CAPTION: (lists features of Original Crosswalk)}
ANNCR: The original CrossWalk: Proven dependability, with a one-and-a-half horsepower motor specifically designed to never need replacing. It's easy to use, it's fun, and with motivational electronics you'll see progress... and you'll get results.
{CAPTION: $49.95, For 10 Months, $499 plus $75, Shipping & Handling}
It's even easy to own, for only $49.95 a month!
{CAPTION: (lists features of Crosswalk Plus)}
The new CrossWalk Plus: Redesigned with a longer, hoodless tread that gives you over 20% more walking space -- in a machine that's actually smaller than the

Original! New fingertip speed adjustment lets you vary your workout and control your pace while you get a total body workout... And with Power Incline, you can increase the intensity without missing a beat.
{CAPTION: $49.95, For 10 Months, $499 plus $75, Shipping & Handling}
Conveniently priced at only $49.95 month.
{CAPTION: (lists features of Crosswalk Advantage)}
The new CrossWalk Advantage has the added safety of a full cage railing which allows you to pick up or put down the resistance arms at any time and a supersize deck that's one of the largest on the market. The Soft Stride suspension deck cushions joints and muscles. Plus, you get speed control in one hand, power incline adjustment in the other. And four pre-set workouts make the Advantage as convenient as having your own Personal Trainer!
{CAPTION: $49.95, For 10 Months, $499 plus $75, Shipping & Handling}
Our most advanced CrossWalk... for only $49.95 a month!
{SUPER: Call Now for FREE Brochure & Video}
For a free brochure and video on the CrossWalk line, call the number on your screen now!
{SUPER: PROFORM PROMISE If within 30 days you don't feel better, look better, and see the results you want, just return it for a full refund. Guaranteed! (Less $75.00 S&H)}
And remember the Proform promise -- the CrossWalk is the finest piece of fitness equipment you can buy. If within 30 days you don't feel better, look better and see the results you want, just return it for a full refund. Guaranteed!
SUPER: CALL NOW
FEMALE VOICE: Call now.
ANNCR: Call now! And discover the benefits of CrossWalk!
[FADE IN DISCLAIMER:]
This program is a paid advertisement presented by Proform Fitness Products, Inc.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1a. Respondent Icon Health and Fitness, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its offices and principal place of business located at 1500 S. 1000 W. Street, in the City of Logan, State of Utah.

1b. Respondent IHF Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its offices and principal place of business located at 1500 S. 1000 W. Street, in the City of Logan, State of Utah.

1c. Respondent IHF Capital, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its offices and principal place of business

located at 1500 S. 1000 W. Street, in the City of Logan, State of Utah.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondents"* shall mean Icon Health and Fitness, Inc., IHF Holdings, Inc., and IHF Capital, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees.

3. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

### I.

*It is ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the "Cross Walk Treadmill" or any other exercise equipment in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. About the relative, comparative, or absolute

(1) Rate at which users burn calories, or the number of calories users burn, through use of such product, or

(2) Weight loss users achieve through use of such product, or

(3) Amount of fat or fat calories users burn through use of such product; or

B. About the benefits, performance, or efficacy of such product with respect to calorie burning, fat burning, or weight loss,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

III.

*It is further ordered*, That respondents Icon Health and Fitness, Inc., IHF Holdings, Inc., and IHF Capital, Inc., and their successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating the representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

*It is further ordered*, That respondents Icon Health and Fitness, Inc., IHF Holdings, Inc., and IHF Capital, Inc., and their successors and assigns, shall deliver a copy of this order to all current and future officers and directors, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, provided, however, that the duty to deliver a copy of this order to future personnel as required by this Part shall terminate three (3) years after the date upon which this order becomes final. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

*It is further ordered*, That respondents Icon Health and Fitness, Inc., IHF Holdings, Inc., and IHF Capital, Inc., and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

*It is further ordered*, That respondents Icon Health and Fitness, Inc., IHF Holdings, Inc., and IHF Capital, Inc., and their successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VII.

This order will terminate on September 9, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

# LIFE FITNESS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3766. Complaint, Sept. 9, 1997--Decision, Sept. 9, 1997*

This consent order requires, among other things, the Illinois-based manufacturer and distributor of stationary exercise cycles to substantiate future weight-loss, calorie-burning or fat-burning claims or benefits of any exercise equipment. In addition, the consent order prohibits the respondent from misrepresenting the result of any test, study or research relating to such benefits.

## *Appearances*

For the Commission: *Laura Fremont* and *Jeffrey Klurfeld.*

For the respondent: *William C. Holmes, Freeborn & Peters,* Chicago, IL.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Life Fitness, a general partnership ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Life Fitness is a New York general partnership with its principal office or place of business at 10601 West Belmont Avenue, Franklin Park, Illinois.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed exercise products to the public, including "Lifecycles," which are exercise bicycles.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for Lifecycles, including but not necessarily limited to the attached Exhibits A through C. These advertisements contain the following statements:

A. "Research has shown that the patented Lifecycle programs allow you to burn over 1,000 calories per hour! . . . ." (Exhibit A)

B. "Remember, the Lifecycle programs have been proven to burn over 1000 calories per hour! . . . ." (Exhibit B)

C. "BURN OVER 1300 CALORIES AN HOUR! . . . ." (Exhibit C)

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that users of the Lifecycle will burn calories at a rate of over 1,000 per hour under conditions of ordinary use.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made.

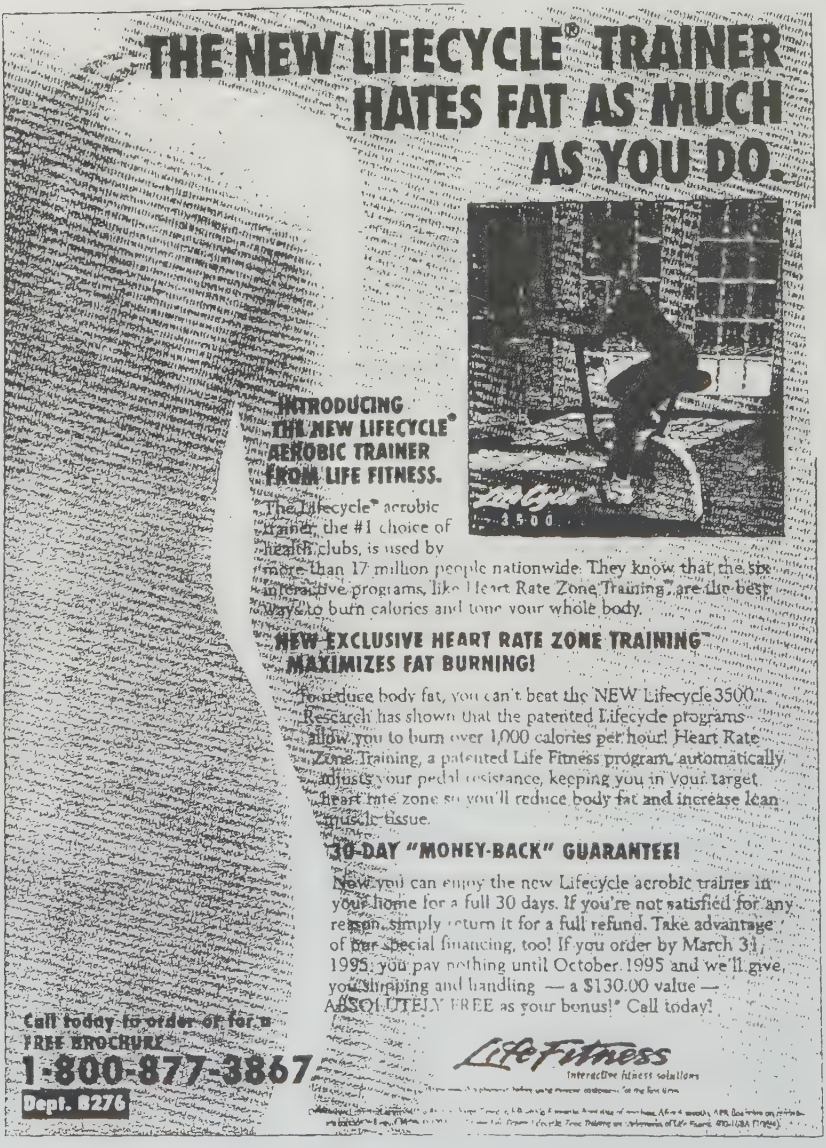
7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that research shows that users of the Lifecycle will burn calories at a rate of over 1,000 per hour under conditions of ordinary use.

9. In truth and in fact, research does not show that users of the Lifecycle will burn calories at a rate of over 1,000 per hour under conditions of ordinary use. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A


THE NEW LIFECYCLE® TRAINER HATES FAT AS MUCH AS YOU DO.
INTRODUCING THE NEW LIFECYCLE® AEROBIC TRAINER FROM LIFE FITNESS.
The Lifecycle® aerobic trainer, the #1 choice of health clubs, is used by more than 17 million people nationwide. They know that the six interactive programs, like Heart Rate Zone Training™, are the best ways to burn calories and tone your whole body.
NEW EXCLUSIVE HEART RATE ZONE TRAINING™ MAXIMIZES FAT BURNING!
To reduce body fat, you can't beat the NEW Lifecycle 3500™. Research has shown that the patented Lifecycle programs allow you to burn over 1,000 calories per hour! Heart Rate Zone Training, a patented Life Fitness program, automatically adjusts your pedal resistance, keeping you in your target heart rate zone so you'll reduce body fat and increase lean muscle tissue.
30-DAY "MONEY-BACK" GUARANTEE!
Now you can enjoy the new Lifecycle aerobic trainer in your home for a full 30 days. If you're not satisfied for any reason, simply return it for a full refund. Take advantage of our special financing, too! If you order by March 31, 1995, you pay nothing until October 1995 and we'll give you shipping and handling — a $130.00 value — ABSOLUTELY FREE as your bonus!* Call today!
Call today to order or for a FREE BROCHURE
1-800-877-3867
Dept. B276
LifeFitness
Interactive fitness solutions

People
7 x10"
Float, None

EXHIBIT A

EXHIBIT B

10601 West Belmont Avenue • Franklin Park, IL 60131

Dear Fitness Enthusiast:

Congratulations on taking the first step toward losing weight, burning fat, building muscle and feeling better by inquiring about the Lifecycle® 3500 aerobic trainer. For over 20 years, Life Fitness has provided more than 17 million people a superior way to reach their personal fitness goals!

**Experience Health Club Results At Home!**

It's important you find a motivating fitness program that fits your lifestyle. That's why we introduced the new Lifecycle 3500 aerobic trainer – a streamlined version of the #1 exercise bike in health clubs. The Lifecycle 3500 gives you a superior workout, that utilizes the largest muscles found in your legs, hips and thighs. In addition, our specifically designed electronic programs create a workout with accurate feedback that's fun and challenging.

**Discover An Easier, More Effective Way To Reach Your Fitness Goals!**

You can begin to experience the benefits of cardiovascular fitness by using the Lifecycle 3500 for as little as 12 minutes a day, three times a week. The computerized console provides the same six programs found on our health club model. Programs like:

- •Hill
- •Manual
- •Heart Rate Zone Training
- •12-Speed Race
- •Random
- •Fit Test

These interactive programs provide variety and motivational feedback for the most effective calorie burning workout you can find. As you exercise, you'll know the speed, the distance, the number of calories burned and more. You will see the results and be motivated to continue working toward your personal fitness goals. Remember, the Lifecycle programs have been proven to burn over 1000 calories per hour! It's just one more reason the Lifecycle 3500 is superior to ordinary fitness machines.

**Pay Only $29.95 Per Month!***

The only way you can discover what the Lifecycle 3500 can do for you is to ride it. That's easy too! Simply try it in your home for 30 days. If you're not completely satisfied, return it for a full refund! Order now and receive shipping and handling FREE! That's a $69.00 savings! If you order now you'll pay as little as $29.95 per month.* Simply fill out the enclosed credit application and order form and return it in the enclosed postage-paid envelope. If for any reason you are not convinced that it's the best in-home exerciser, just return it at our expense. You have nothing to lose – only health and fitness to gain.

**Order Today! Call 1-800-877-3867 Now!**

Experience health club fitness at home today! Call toll-free now and our knowledgeable fitness consultants will take your order and answer any questions you may have. Don't delay – this special offer expires soon. Call now and take your first step toward better fitness.

Sincerely,

Augie Nieto

Augie Nieto
President, Life Fitness

EXHIBIT B

P.S. Remember, order today and receive shipping and handling ABSOLUTELY FREE! That's a $69.00 value!

P.P.S. Take advantage of our 30-day in-home trial — it's the first step towards a lifetime of health and fitness.

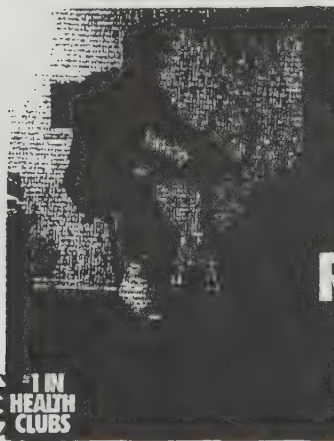
**1-800-877-3867**

CALL FOR A 30-DAY "TEST RIDE!"

LIFE FIT

EXHIBIT C

# OWN THE #1 HEALTH CLUB EXERCISE BIKE IN AMERICA.



# LIFECYCLE

AEROBIC TRAINER

## THE CALORIE BURNER THAT REVOLUTIONIZED AMERICA'S HEALTH CLUBS.

#1 IN HEALTH CLUBS

### THE ONLY IN-HOME BIKE WITH HEALTH CLUB QUALITY!

Lifecycle® aerobic trainers revolutionized health clubs with the first computer consoles and motivating workout programs. Now you can own the same exercise bike found in over 90% of health clubs nationwide. Lose weight, tone muscles, reduce stress and improve your cardiovascular conditioning—all on your own schedule with the Lifecycle 5500 in your home.

### BURN OVER 1300 CALORIES AN HOUR!

Ride just 20 minutes a day, three days a week, on the Lifecycle 5500 and you'll see results. This non-weight-bearing exercise burns maximum calories and gives you top cardiovascular training. Developed by Life Fitness, the leader in health club equipment, the Lifecycle 5500 lets you comfortably watch TV, read or talk on the phone while you reach your fitness goals!

### MOTIVATIONAL PROGRAMS KEEP THE WEIGHT OFF!

The Lifecycle 5500 features five motivational workout programs, including the popular Hill Profile that simulates outdoor riding by automatically varying the pedal resistance as you conquer hills and valleys. The computer console continuously displays your progress as your fitness level improves, so that you will stay motivated and challenged.

Lifecycle 5500 console

### THE FIRST 30-DAY NO COST TRIAL OFFER—CALL TODAY!

Call now to try the Lifecycle 5500 FREE for 30 days. Should you feel it's not the best home workout ever, we'll pick it up free of charge and return your uncashed check or delete your credit card data. After 30 days it costs only $29.95 per month. Plus, order today and receive 0% financing and free shipping and handling—a total savings of over $100! Join over 17 million daily Lifecycle trainer users. Call today!

**0% FINANCING! ONLY $29.95 PER MONTH**

**CALL BEFORE DECEMBER 31, 1995 FOR 0% FINANCING & FREE SHIPPING & HANDLING**

**1-800-877-3867**

Dept. B449

☐ Yes! I'm ready for a health club workout at home! Please send me the order information for this limited time offer. Then send me the Lifecycle 5500 to try FREE for 30 days.

☐ Please send me a FREE booklet

Name _____

Address _____

City _____ State _____ Zip _____

Daytime phone _____

Send coupon to:
Life Fitness
[illegible]
[illegible]

Life Fitness

**CALL 1-800-877-3867 FOR MORE INFORMATION**

**OR THE RETAILER NEAREST YOU.**

No down payment, 0% financing, plus state sales tax. Finance offer may not be available in all retail locations. This offer is only valid in the U.S. Offer subject to credit approval.
© 1995 Life Fitness. All rights reserved. Life Fitness and Lifecycle are registered trademarks of Life Fitness. 470-418/8/95

Sports Illustrated
[illegible]
133L NEU, PED, 2-NEDs and 5 MPs
95-3865

EXHIBIT C

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent and its general partner, The Life Fitness Companies L.P., having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its general partner, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent and its general partner of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent or its general partner that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Life Fitness is a general partnership organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at 10601 West Belmont Avenue, in the City of Franklin Park, State of Illinois.

The Life Fitness Companies L.P. is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 10601 West Belmont Avenue, in the City of Franklin Park, State of Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and respondent's general partner, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondent"* shall mean Life Fitness, a general partnership, and its successors and assigns.

3. Unless otherwise specified, references to respondent's *"general partner"* shall mean The Life Fitness Companies L.P., a limited partnership, and its successors and assigns.

4. Unless otherwise specified, *"the partnerships"* shall mean respondent and its general partner as defined in this order.

5. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

### I.

*It is ordered*, That respondent and its general partner, and their officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any "Lifecycle," or any other exercise equipment in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. About the rate at which users burn calories, or the number of calories users burn, through use of such product;

B. About the weight loss or fat loss users achieve through use of such product; or

C. About the benefits, performance, or efficacy of such product with respect to calorie burning, fat burning, or weight loss,

unless, at the time the representation is made, respondent and its general partner possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

*It is further ordered*, That respondent and its general partner, and their officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research relating to calorie burning, fat burning, or weight loss.

III.

*It is further ordered*, That respondent and its general partner shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating the representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

*It is further ordered*, That respondent and its general partner shall deliver a copy of this order to all current and future principals, partners, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, provided, however, that the duty to deliver this order to future personnel as required by this Part shall terminate three (3) years after the date upon which this

order becomes final. Respondent and its general partner shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

*It is further ordered*, That respondent and its general partner shall notify the Commission at least thirty (30) days prior to any change in the partnership(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, incorporation, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the partnership name or address. Provided, however, that, with respect to any proposed change in the partnership about which the partnerships learn less than thirty (30) days prior to the date such action is to take place, the partnerships shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

*It is further ordered*, That respondent and its general partner shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VII.

This order will terminate on September 9, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any party that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent or its general partner did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Azcuenaga concurring in part and dissenting in part.

## STATEMENT OF COMMISSIONER AZCUENAGA CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's final decision and order in this matter except to the extent that The Life Fitness Companies, L.P. (the parent company of Life Fitness), although not named in the complaint or in the caption of the order, is included in the order's substantive provisions. Rather than consenting to be named in the complaint and order, The Life Fitness Companies, L.P., has agreed to be bound by the order as if it were a named respondent. It is fundamental that complaints are the predicate on which Commission orders must be based. *See* 15 U.S.C. 45(b). Either Life Fitness Companies, L.P., as a party responsible in whole or in part for the unlawful conduct alleged, should be included in both the complaint and the order, or the company should be removed from the order.

Only those persons named in Commission complaints as alleged wrongdoers, their successors or assigns, or those who are employed by or otherwise are subject to the direction and control of such parties, should be included in Commission orders. The Life Fitness Companies, L.P., owns 99% of the named respondent and thereby controls, or is capable of controlling, its subsidiary's actions rather than the reverse. Indeed, it may have participated in some way in the actions challenged in the complaint, but I see no basis under Section 5 of the FTC Act for imposing an order to cease and desist on a nonparty.

IN THE MATTER OF

# OERLIKON-BUHRLE HOLDING AG

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3555. Consent Order, Feb. 1, 1995--Modifying Order, Sept. 9, 1997*

This order reopens a 1995 consent order -- involving Oerlikon-Buhrle's acquisition of Leybold AG -- and modifies the consent order by substituting a prior notice provision for the prior approval provision of the consent order.

## ORDER REOPENING AND MODIFYING ORDER

On May 12, 1997, Oerlikon-Buhrle Holding AG ("Oerlikon"), the respondent named in the consent order issued by the Commission on February 1, 1995, in Docket No. C-3555 ("order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter.

Oerlikon asks that the Commission reopen and modify the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and consistent with the Statement of the Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued June 21, 1995 ("Prior Approval Policy Statement"),[1] to eliminate the requirement that Oerlikon obtain the prior approval of the Commission before acquiring certain assets or interests relating to the manufacture and sale of compact disc metallizer machines or turbomolecular pumps. Oerlikon's Petition was on the public record for thirty days until May 14, 1997, and no comments were received. As discussed below, the prior approval requirement of paragraph VII of the order is set aside and a limited prior notice provision is substituted in paragraph VII.

The Commission, in its Prior Approval Policy Statement, concluded that a general policy of requiring prior approval is no longer needed, citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior approval or prior notice may be appropriate in the public interest in certain limited circumstances. For example, a narrow prior approval provision may be appropriate "where there is

[1] 60 Fed. Reg. 39,745,47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger," and "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. The need for prior approval or prior notice will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

When a petition is filed to reopen and modify an order pursuant to the Prior Approval Policy Statement, the rebuttable presumption is that the public interest requires reopening the order and modifying it consistent with the announced policy. Setting aside the prior approval requirement in the order would be consistent with the announced policy. Characteristics of the markets identified in the complaint and order suggest, however, that a limited prior notice provision would be appropriate. The markets identified in the complaint remain concentrated, and an acquisition by Oerlikon of a significant competitor in one of the markets may not be reportable under the Hart-Scott-Rodino Act. A prior notice requirement would ensure the opportunity to review any such transactions. Therefore, consistent with the Prior Approval Policy Statement, paragraph VII of the order should be modified to substitute a prior notification provision for the prior approval provision.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

*It is further ordered*, That paragraph VII of the order be, and it hereby is, modified as of the effective date of this order as follows:

VII.

*It is further ordered*, That, for a period of ten (10) years from the date this order becomes final, Oerlikon Buhrle shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition, the manufacture of turbomolecular pumps;

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, distribution, or sale of turbomolecular pumps;

C. Acquire any of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition, the manufacture of compact disc metallizers; or

D. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, distribution, or sale of compact disc metallizers.

Provided, however, that this paragraph VII shall not apply to the acquisition of products or services in the ordinary course of business, or of any non-exclusive license to any patent or other form of intellectual property (excluding assets of the Leybold Compact Disc Business and Balzers-Pfeiffer).

The prior notifications required by this paragraph VII shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee shall be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made and has been made pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

IN THE MATTER OF

# EXXON CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9281. Complaint, Sept. 11, 1996--Decision, Sept. 12, 1997*

This consent order requires, among other things, the respondent to produce a nationwide consumer education campaign informing consumers that regular gasoline, not high octane gasoline, is right for most cars, and also requires the production of a free consumer brochure, concerning gasoline octane, to be distributed, for two years, to Exxon's service stations nationwide. In addition, the consent order prohibits Exxon from making claims concerning the engine cleaning ability of any gasoline or the effect of any gasoline on automobile maintenance or maintenance costs without adequate scientific evidence to substantiate the claims.

## *Appearances*

For the Commission: *Theodore H. Hoppock, Joel Winston, Beth Grossman, Sydney Knight* and *Michael Dershowitz*.

For the respondent: *S. William Livingston, Robert D. Wick* and *Eugene I. Lambert, Covington & Burling,* Washington, D.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Exxon Corporation, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a New Jersey corporation with its principal office or place of business at 225 E. John W. Carpenter Freeway, Irving, Texas.

2. Respondent has advertised, offered for sale, sold, and distributed gasoline and other petroleum products to the public, including Exxon Supreme 93 octane gasoline, Exxon Plus 89 octane gasoline, and Exxon Regular 87 octane gasoline.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or caused to be disseminated advertisements for Exxon gasoline, including but not necessarily

limited to the attached Exhibits A through E. These advertisements contain the following statements and depictions:

A. Announcer: There's a new gasoline. . .
Man: What's new about it?
Announcer: With the power to drive down maintenance costs.
[Video: Flashing display of consecutive words in large bold type across width of screen: WITH THE POWER TO DRIVE DOWN MAINTENANCE COSTS]
Man #2: Really?
Woman: Are you serious?
Announcer: Yes we are! New Exxon 93 Supreme keeps your engine cleaner.
Woman #2: Clean is good.
Announcer: So it can help drive down maintenance costs.
Man #2: Could gas do that?
Announcer: New Exxon 93 Supreme can, with the power to drive down maintenance costs.
Woman #2: Gas that can save you money.
Announcer: For more reliable performance.
Woman #3: Okay, I'll try it.
[Exhibit A. Television Advertisement]

B. Announcer: There's a new gasoline. . .
Man: What's new about it?
Announcer: With the power to drive down maintenance costs.
[Video: Flashing display of consecutive words in large bold type across width of screen: WITH THE POWER TO DRIVE DOWN MAINTENANCE COSTS]
Man #2: Really?
Woman: Are you serious?
Announcer: Yes we are! New Exxon gasoline keeps your engine cleaner.
Woman #2: Clean is good.
Announcer: So it can help drive down maintenance costs.
Man #2: Could gas do that?
Announcer: New Exxon gasoline can, with the power to drive down maintenance costs.
Woman #2: Gas that can save you money.
Announcer: For more reliable performance.
Woman #3: Okay, I'll try it.
[Exhibit B. Television Advertisement]

C. Announcer: There's a hard-working gasoline. . .
Man: You sure about this?
Announcer: With the power to drive down maintenance costs.
[Video: Flashing display of consecutive words in large bold type across width of screen: WITH THE POWER TO DRIVE DOWN MAINTENANCE COSTS]
Man: Really?
Woman: Are you serious?
Announcer: Yes we are. Exxon gasoline keeps your engine cleaner.
Woman: Clean is good.
Announcer: So it can help drive down maintenance costs.
Man: Can gas do that?
Announcer: Exxon gasoline can, with the power to drive down maintenance costs.

Woman: Good idea.
Announcer: And so is this. Cash and credit prices are the same.
Woman: Okay, I'll try it.
[Exhibit C. Television Advertisement]

D. Announcer: There's a hard-working gasoline. . .
Man: You kiddin' me?
Announcer: With the power to drive down maintenance costs.
Man: Really?
Woman: Are you serious?
Announcer: Yes, we are. Exxon 93 Supreme gasoline keeps your engine cleaner.
Woman: Clean is good.
Announcer: So it can help drive down maintenance costs.
Man: Could gas do that?
Announcer: Exxon 93 Supreme can. With the power to drive down maintenance costs.
Woman: Gas that can save you money.
Announcer: For more reliable performance.
Woman: Ok, I'll try it.
[Exhibit D. Radio Advertisement]

E. Announcer: There's a hard working gasoline. . .
Man: You sure about this?
Announcer: With the power to drive down maintenance costs.
Man: Really?
Woman: Are you serious?
Announcer: Yes, we are. Exxon gasoline keeps your engine cleaner.
Woman: Clean is good.
Announcer: So it can help drive down maintenance costs.
Man: Could gas do that?
Announcer: Exxon gasoline can. With the power to drive down maintenance costs.
Woman: Gas that can save you money.
Announcer: For more reliable performance.
Woman: Ok, I'll try it.
[Exhibit E. Radio Advertisement]

5. Through the means described in paragraph four, including but not necessarily limited to Exhibits A and D, respondent has represented, expressly or by implication, that:

A. Switching to Exxon 93 Supreme gasoline from other brands of gasoline will significantly reduce automobile maintenance costs for consumers generally; and

B. Switching to Exxon 93 Supreme gasoline from lower octane grades of Exxon gasoline will significantly reduce automobile maintenance costs for consumers generally.

6. Through the means described in paragraph four, including but not necessarily limited to Exhibits B, C and E, respondent has represented, expressly or by implication, that switching to Exxon gasolines from other brands of gasoline will significantly reduce automobile maintenance costs for consumers generally.

7. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraphs five and six, at the time the representations were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraphs five and six, at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 (a) of the Federal Trade Commission Act.

EXHIBIT A

# TV

PRODUCT EXXON PETRO GASOLINE
TITLE: "A NEW GASOLINE"
PROGRAM NEWS
STATION WABC

5/15/95 (NEW YORK)

Exhibit A

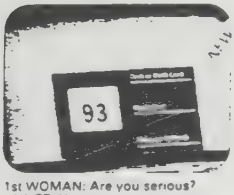
30
11 27PM

(MUSIC)
WOMAN SING: People stopping by.

ANNCR: There's new gasoline--
1st MAN: What's new about it?

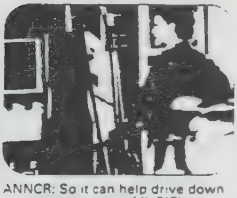
ANNCR: --with the power

to drive down maintenance cost.
1st MAN: Really?




1st WOMAN: Are you serious?
ANNCR: Yes we are.

New Exxon 93 Supreme keeps your engine cleaner.
2nd WOMAN: Clean is good.



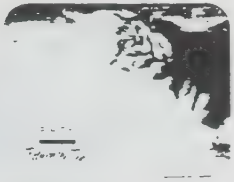
ANNCR: So it can help drive down maintenance cost. (MUSIC)

2nd MAN: Could gas do that?
ANNCR: New Exxon '93 Supreme can,

with the power to drive down maintenance cost.
2nd WOMAN: Gas that can save you money!.

ANNCR: For more reliable performance
3rd WOMAN: Okay, I'll try it

WOMAN SING: People stopping by to rely



on the Tiger
MUSIC OUT

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT B

Exhibit B

RTV

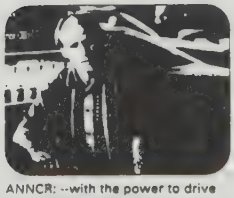
317 Madison Avenue, New York, NY 10017 (212) 309 1400

PRODUCT EXXON PETRO GASOLINE
TITLE: "MORE RELIABLE PERFORMANCE"
PROGRAM: NEWS 7/17/95 :30
STATION: KDKA (PITTSBURGH) 6:21PM

(MUSIC)

ANNCR: There's a new gasoline--

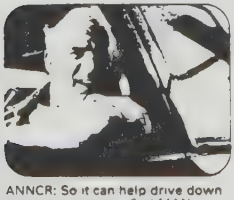
1st MAN: What's new about it?



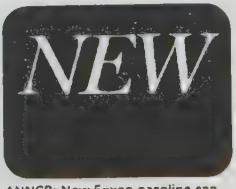
ANNCR: --with the power to drive down maintenance costs. 1st MAN: Really?

1st WOMAN: Are you serious? ANNCR: Yes, we are. New Exxon gasoline keeps your engine cleaner.

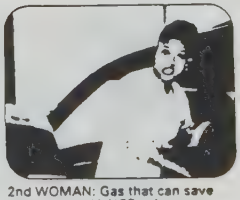
2nd WOMAN: Cleaner is good.



ANNCR: So it can help drive down maintenance costs. 2nd MAN: Could gas do that?




ANNCR: New Exxon gasoline can, with the power to drive down maintenance costs--



2nd WOMAN: Gas that can save you money. ANNCR: --for more reliable performance.

3rd WOMAN: Okay, I'll try it.

WOMAN SINGS: People stoppin' by

to rely on the tiger. (MUSIC OUT)

ALSO AVAILABLE ON VIDEO-TAPE CASSETTE

EXHIBIT C

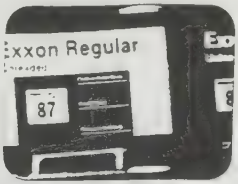
Exhibit C

RTV

317 Madison Avenue New York NY 10017 (212) 309 1400

| | | | |
|---|---|---|---|
| PRODUCT | EXXON PETO GASOLINE | | |
| TITLE | "A HARD WORKING GASOLINE" | | |
| PROGRAM | GOOD DAY NEW YORK | 01/22/96 | 30 |
| STATION | WNYW | (NEW YORK) | 8:10AM |

(MUSIC/SFX) (VARIOUS VOICES)




ANNCR: There's a hard working gasoline--

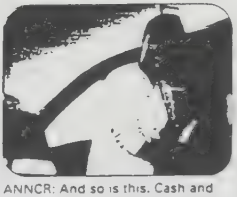
MAN: You sure about this?

ANNCR: --with the power to drive down

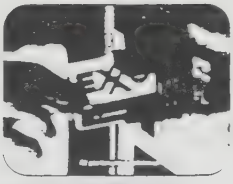
maintenance costs. MAN: Really? WOMAN: Are you serious? ANNCR: Yes we are. Exxon Gasoline keeps your engine

cleaner. WOMAN: Clean is good. ANNCR: So it can help drive down maintenance costs. MAN: Can gas do that? ANNCR: Exxon Gasoline

can, with the power to drive down maintenance costs. WOMAN: Good idea.

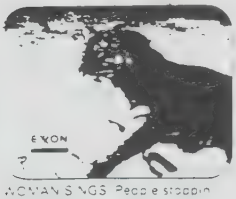


ANNCR: And so is this. Cash and



credit prices are the same.

WOMAN: Okay.




WOMAN SINGS: People stoppin by to pay

announcer: MUSIC OUT

ALSO AVAILABLE ON VIDEO-TAPE CASSETTE

EXHIBIT D

Exhibit D

McCANN-ERICKSON HOUSTON

McCann-Erickson, Inc., 1360 Post Oak Boulevard, Suite 1900, Houston, Texas 77056 713-968-0300

Client: EXXON CO. U.S.A.
Product: MOTOR GASOLINE
Format: :30 RADIO
Status: AS RECORDED
Job No.: 1208-95
Date: 12/13/95

C-6EX30-EX18
"SOUNDBITES" MAINTENANCE COSTS
"NON-NEW" SUPREME VERSION

MUSIC: "PEOPLE STOPPIN BY" THEME UP AND UNDER

ANNCR: There's a hard-working gasoline...

MAN: You kiddin' me?

ANNCR: With the power to drive down maintenance costs.

MAN: Really?

WOMAN: Are you serious?

ANNCR: Yes, we are. Exxon 93 Supreme keeps your engine cleaner--

WOMAN: Clean is good.

ANNCR: So it can help drive down maintanance costs--

MAN: Could gas do that?

ANNCR: Exxon 93 Supreme can. With the power to drive down maintanance costs.

WOMAN: Gas that can save you money.

ANNCR: For more reliable performance.

WOMAN: OK, I'll try it.

SINGERS: PEOPLE STOPPIN' BY TO RELY ON THE TIGER.

EXHIBIT E

Exhibit E

McCANN-ERICKSON HOUSTON

McCann-Erickson, Inc., 1360 Post Oak Boulevard, Suite 1900, Houston, Texas 77056 713-966-0505

Client EXXON CO. U.S.A.
Product MOTOR GASOLINE
Format :30 RADIO
Status AS RECORDED
Job No. 1600-96
Date 01/11/96

"NON-NEW" SOUNDBITES
ALL GRADES VERSION

MUSIC: "PEOPLE STOPPIN BY" THEME UP AND UNDER

ANNCR: There's a hard-working gasoline...

MAN: You sure about this?

ANNCR: With the power to drive down maintenance costs.

MAN: Really?

WOMAN: Are you serious?

ANNCR: Yes, we are. Exxon gasoline keeps your engine cleaner--

WOMAN: Clean is good.

ANNCR: So it can help drive down maintenance costs--

MAN: Could gas do that?

ANNCR: Exxon gasoline can. With the power to drive down maintenance costs.

WOMAN: Gas that can save you money.

ANNCR: For more reliable performance.

WOMAN: OK, I'll try it.

SINGERS: PEOPLE STOPPIN' BY TO RELY ON THE TIGER.

## DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a copy of the contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Exxon Corporation is a New Jersey corporation, with its offices and principal place of business located at 225 E. John W. Carpenter Freeway, Irving, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise

of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondent"* shall mean Exxon Corporation, its successors and assigns, and its officers, agents, representatives and employees.

3. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Exxon Supreme 93 octane gasoline, Exxon Plus 89 octane gasoline, Exxon Regular 87 octane gasoline or any other gasoline of any grade or octane rating in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, concerning the engine cleaning ability of any gasoline (including a constituent ingredient, octane rating or grade thereof); or the effect of any gasoline (including a constituent ingredient, octane rating or grade thereof) on automobile maintenance or automobile maintenance costs, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

For purposes of this Part, any representation, directly or by implication, that any gasoline will keep clean fuel injector deposits to a level that engine performance is not adversely affected by such deposits is deemed to be substantiated if respondent possesses and relies upon competent and reliable testing demonstrating no more than 5 percent flow restriction in each injector over the accumulation of 10,000 miles, in accordance with the test procedures and performance standards for port fuel injector deposit control set forth by the United States Environmental Protection Agency at 40 CFR 80.161-80.173 (1996). If this regulation is formally superseded or amended by the EPA, then compliance with the superseding or amended regulation shall be deemed substantiation for such representation.

For purposes of this Part, any representation, directly or by implication, that any gasoline will clean up fuel injector deposits to

a level that engine performance is not adversely affected by such deposits is deemed to be substantiated if respondent possesses and relies upon competent and reliable testing demonstrating that the flow rate in each injector is restored to no more than 5 percent flow restriction over the accumulation of 10,000 miles.

For purposes of this Part, any representation, directly or by implication, that a gasoline will keep clean intake valve deposits to a level that engine performance is not adversely affected by such deposits is deemed to be substantiated if respondent possesses and relies upon competent and reliable testing demonstrating intake valve deposit weight of less than 100 mg-per-valve on average over the accumulation of 10,000 miles, in accordance with the test procedures and performance standards for intake valve deposit control set forth by the United States Environmental Protection Agency at 40 CFR 80.161-80.173 (1996). If this regulation is formally superseded or amended by the EPA, then compliance with the superseding or amended regulation shall be deemed substantiation for such representation.

For purposes of this Part, any representation, directly or by implication, that a gasoline will clean up intake valve deposits to a level that engine performance is not adversely affected by such deposits is deemed to be substantiated if respondent possesses and relies upon competent and reliable testing demonstrating that the intake valve deposit weight is restored to less than 100 mg-per-valve on average over the accumulation of 10,000 miles.

Provided, however, that nothing in this order shall prohibit respondent from truthfully representing the numerical octane rating of any gasoline.

II.

*It is further ordered*, That respondent shall produce and disseminate an educational television message as set forth below:

A. The message shall be fifteen (15) seconds in length and shall contain the audio and video elements set forth in Appendix A to this order. The message shall not contain any audio or visual element or technique that materially alters, obscures or detracts from the communication of the statements contained therein. Respondent shall submit a videotape of the message to Commission staff at least twenty (20) days prior to the first scheduled broadcast of the message.

B. The message shall be broadcast in the eighteen markets in the United States set forth in Appendix B to this order.

C. The message shall be broadcast during two different periods of time: (1) the last three weeks of September 1997 and (2) beginning no less than thirty (30) days after the termination of the first period, but completed no later than November 21, 1997. For each period of time, the message shall be broadcast over the course of not less than two weeks.

D. For the September 1997 period in which the message is broadcast, 178 "Target Rating Points (TRPs)" shall be purchased by respondent to achieve a "percentage reach" of the "target audience" of sixty-five percent (65%) plus or minus five tenths of one percent (± .5%) and an "average frequency of exposure" of 2.70 plus or minus five one hundredths (± .05) for each market in which the message is broadcast. For the October/November 1997 period in which the message is broadcast, 104 "Target Rating Points (TRPs)" shall be purchased by respondent to achieve a "percentage reach" of the "target audience" of fifty-one percent (51%) plus or minus five tenths of one percent (± .5%) and an "average frequency of exposure" of 2.00 plus or minus five one hundredths (± .05) for each market in which the message is broadcast. For purposes of this part, "percentage reach" shall mean the percentage of different persons of the target audience that view the message at least once in each period of time the message is broadcast as determined by an established audience rating service; "target audience" shall mean the 18-49 year old component of the viewing audience; "average frequency of exposure" shall mean the average number of different times the members of the target audience view the message as determined by an established audience rating service; and "Target Rating Points (TRPs)" shall mean the mathematical product of the percentage reach and the average frequency of exposure.

E. Respondent shall monitor the purchase of each dissemination schedule and shall provide to Commission staff a written report indicating the purchase of the required Target Rating Points in each market for each time period in which the message is to be broadcast. Respondent shall submit this purchase report at least fifteen (15) days prior to the start of the first broadcast of the message in September 1997 and at least fifteen (15) days prior to the start of the first broadcast of the message in October/November 1997.

F. For each of the two time periods during which the message is broadcast, as set forth above, respondent shall submit to Commission

staff a written report detailing the TRPs achieved by the message in each of the markets in which it was broadcast. The report shall be based on ratings provided by an established audience ratings service. Each report shall be submitted within one hundred twenty (120) days after the last day of the calendar quarter in which the message was broadcast, but in any event no later than thirty (30) days after respondent's receipt of said ratings. In any market where the message fails to achieve ninety percent (90%) of the total TRPs purchased for each dissemination period, as set forth above, respondent shall use its best efforts to obtain compensatory (or additional) time to rebroadcast the message to achieve the TRPs purchased in each market within sixty (60) days following the presentation to Commission staff of each written report. Respondent shall monitor any compensatory broadcasts of the message and provide to Commission staff a final written report detailing the TRPs achieved by the message in each of the markets in which it was rebroadcast.

III.

*It is further ordered*, That respondent shall produce, print and distribute to Exxon service stations a color brochure entitled "Answering Your Questions About Octane," as set forth below:

A. The brochure shall be in the form and content set forth in Appendix C to this order. Respondent shall submit a production-ready copy of the brochure to Commission staff at least twenty (20) days prior to the first scheduled distribution of the brochure to Exxon service stations.

B. Respondent shall distribute the brochure, in quantities sufficient to meet reasonably anticipated demand, to every Exxon service station in the United States, within sixty (60) days after the date of service of this order. With respect to Exxon-operated service stations, respondent shall instruct the stations to make the brochures available in a prominent and readily accessible location at the station, such as at the gasoline pump islands. With respect to independently-operated Exxon service stations, respondent shall use its best efforts to encourage the stations to make the brochures available in a prominent and readily accessible location.

C. Respondent shall distribute the brochures to Exxon service stations at no cost to the stations or the public.

D. Respondent shall monitor the demand for and supply of brochures at Exxon service stations, and shall continue to produce

and distribute the brochures as necessary to meet reasonably anticipated demand for a period of at least two (2) years after the date of service of this order.

E. Respondent shall provide to Commission staff written reports detailing the total number of brochures printed and distributed to Exxon service stations, including any additional distributions of brochures to stations subsequent to the initial distribution. Respondent shall submit such reports every six (6) months, beginning six (6) months after the initial distribution of brochures to Exxon service stations, and continuing for two (2) years thereafter.

IV.

*It is further ordered*, That respondent Exxon Corporation, and its successors and assigns, shall, for three (3) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

*It is further ordered*, That respondent Exxon Corporation, and its successors and assigns, shall within thirty (30) days after the date of service of this order distribute a copy of this order to all operating divisions, subsidiaries, and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements or promotional sales materials covered by this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order.

VI.

*It is further ordered*, That respondent Exxon Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VII.

*It is further ordered*, That respondent Exxon Corporation shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VIII.

This order will terminate on September 12, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Azcuenaga concurring in part and dissenting in part, and Commissioner Starek recused.

APPENDIX A
EXXON
Hi, I'm Sherri Stuewer. I run Exxon's Baytown Refinery.
We offer three octane grades. Which is right for you?
EXXON
Most cars will run properly on regular octane, so check your owner's manual...
and stop by Exxon for this helpful pamphlet.

APPENDIX B

1997 EXXON GASOLINE
Stand-alone :15's for September, November flights

---:15 in 18 Markets---

| | Target Imprs (000) | TRPs | Gross Imprs (000) | GRPS |
|---|---|---|---|---|
| Baltimore | 3,666 | 282 | 4,651 | 470 |
| Baton Rouge | 1,010 | 282 | 1,270 | 470 |
| Dallas | 7,104 | 282 | 8,688 | 470 |
| Houston | 6,373 | 282 | 7,498 | 470 |
| New York | 25,544 | 282 | 31,544 | 470 |
| Norfolk | 2,374 | 282 | 2,969 | 470 |
| Philadelphia | 9,526 | 282 | 12,474 | 470 |
| Richmond | 1,760 | 282 | 2,166 | 470 |
| San Antonio | 2,391 | 282 | 3,016 | 470 |
| Washington, DC | 7,591 | 282 | 8,970 | 470 |
| | 67,339 | 282 | 83,246 | 470 |
| Austin | 1,605 | 282 | 2,050 | 470 |
| Boston | 7,992 | 282 | 10,106 | 470 |
| Charleston -- Huntington | 1,610 | 282 | 2,269 | 470 |
| Corpus Christi | 592 | 282 | 847 | 470 |
| Nashville | 2,685 | 282 | 3,680 | 470 |
| Orlando | 3,243 | 282 | 4,803 | 470 |
| Pittsburgh | 3,658 | 282 | 5,400 | 470 |
| Tampa | 3,830 | 282 | 6,634 | 470 |
| | 25,214 | 282 | 35,788 | 470 |
| 18 Mkt Total | 92,552 | 282 | 119,034 | 470 |

---Adults 18-49---

| Schedule Analysis: | % Rch 1+ | Avg Freq | TRPS |
|---|---|---|---|
| September | 65 | 2.7 | 178 |
| November | 51 | 2.0 | 104 |
| Combined | 75 | 3.7 | 282 |

APPENDIX C

## Answering Your Questions About Octane

Q. What are Octane Ratings?

A. Octane ratings are a measure of a gasoline's ability to resist engine knock or pinging. The higher the octane rating, the greater the

gasoline's resistance to knock. Knock is a sharp, metallic-sounding, or pinging noise that results from uncontrolled combustion.

Q. What octane levels are available at Exxon stations?

A. Exxon offers three grades of unleaded gasoline at our service stations: 87 octane (Exxon Regular), 89 octane (Exxon Plus), and 93 octane (Exxon Supreme). In high altitude areas, such as the Rocky Mountains, the equivalent octane levels typically available are 85, 86 and 91. All three grades contain the same amount of our engine cleaning additive.

Q. What octane level is right for my car?

A. To find out what octane your engine needs, first check your owner's manual. The recommended level is often unleaded regular (87 octane). Some models have high compression engines which are designed to utilize the octane level in Exxon Plus or Supreme.

Ordinarily, your car will not benefit from using a higher octane than is recommended in the owner's manual. But if your engine knocks or pings at the recommended octane level, you may need a higher octane gasoline to prevent the knock. Knocking may occur under certain conditions. A small percentage of cars may knock because of variations in engines of the same model due to manufacturing tolerances, or because of an unusual build-up of engine deposits during the first 15,000 miles of driving. Other factors such as extremely hot weather, changes in altitude or hard driving conditions (like towing a heavy load) may also cause knocking.

Many modern cars are equipped with an electronic device that detects and eliminates light knocking before you hear it. The devices suppress knock by retarding the spark. Exxon believes that some of these cars may experience some deterioration of acceleration performance, without knocking, when operating under high engine demand conditions.

Q. Is knocking serious? What should I do if my car is knocking or pinging?

A. Occasional light knocking is not harmful to the engine, but heavy knocking or continuous operation with audible knock can cause loss of power and even engine damage. If your engine is knocking, switching to a higher octane gasoline may solve the problem. If the knocking or pinging continues after one or two fill-ups, have your engine checked by a qualified mechanic to make sure it is calibrated correctly and has no mechanical or electrical problems. You may need a tune-up or some repair work.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Last year, the Commission issued a complaint against Exxon Corporation and, in accordance with its practice, a Notice of Contemplated Relief, the title of which is self-explanatory. The complaint alleged that Exxon had made certain deceptive claims concerning the need for its premium gasoline. Today the Commission approves a settlement and issues a final decision and order that provides less relief than the Commission contemplated when it issued the complaint and less relief than it ordered against other companies that previously have settled similar charges.[1] I agree that the core provision of the order barring the allegedly deceptive claims is appropriate,[2] but I cannot agree to the omission of a broader provision barring Exxon from making unsubstantiated claims concerning "the relative or absolute attributes of any gasoline with respect to engine performance, power [or] . . . acceleration."

An injunctive provision covering not just the specific claims challenged in the complaint, but also, future deceptive claims of a similar nature is a common feature in Commission advertising orders. It provides an important deterrent, because any future advertising claims that do not comport with it are punishable by substantial civil penalties. The Commission previously has challenged similar advertising claims by three other gasoline companies, all of which, unlike Exxon, agreed to settlements without litigation, and all of which consented to inclusion of the broader injunctive relief omitted from this order.

Exxon's advertisements seem likely to have contributed to consumer misperceptions about the attributes of and the need for premium gasoline as much as gasoline advertisements run by the other companies. The more lenient injunctive coverage in Exxon's order will be less effective in deterring future deception and may create perverse incentives. In the future, companies may believe it is in their interest to decline negotiated settlement until after litigation has commenced if they think that the Commission will reward greater intransigence.

Narrowing the injunction might be worthwhile if some other effective remedy were added, and the order adds a provision that

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[1] *See* Sun Company, Inc., Docket C-3381 (consent order, May 6, 1992); Unocal Corporation, Inc., Docket C-3493 (consent order, April 24, 1994); Amoco Oil Company, Docket C-3655 (consent order, May 7, 1996).

[2] Order ¶ I.

requires Exxon to produce and disseminate a 15-second television commercial and distribute a certain number of copies of a brochure.[3] Given the apparently entrenched consumer misperceptions allegedly created by Exxon's challenged claims about the need for and attributes of premium gasoline, a consumer education remedy is justified. The goal of the consumer education campaign, to correct apparently widespread and assuredly costly consumer misperceptions about the benefits of high octane gasoline, is laudable. Unfortunately, I do not believe that this particular campaign is likely to be effective. The Commission has extensive experience with advertising techniques, and that experience should tell us that there is a good deal more to creating a successful advertisement than first meets the eye.[4] The commercial is uninspired at best, and we have no basis for concluding that it will be effective in conveying the desired message to consumers or in changing their misperceptions. The order does not provide a performance standard or other means of assuring that this goal will be met.[5]

Although it may be argued that we similarly have no assurance of the effectiveness of the broader injunction that was included in the Notice of Contemplated Relief, we have, at least, the assurance that further deceptive claims covered by the order may result in substantial civil penalties and, therefore, that the company may think twice before running advertisements that might mislead reasonable consumers about the attributes of particular gasoline products. In addition, the injunctive relief would remain in place for 20 years, far longer than the likely effects of the single short-lived advertising campaign provided in the order. On balance, I believe that the notice order is stronger. Perhaps the fact that Exxon was willing to agree to this order rather than the notice order should tell us something.

To the extent that the order is more narrow than the notice order, I respectfully dissent.

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[3] The text of the negotiated advertisement is:

Hi, I'm Sherri Stuewer. I run Exxon's Baytown Refinery. We offer three octane grades. Which is right for you? Most cars will run properly on regular octane, so check your owner's manual...and stop by Exxon for this helpful pamphlet.

[4] The advertisement required by the order has not been copytested.

[5] The order could have specified survey methodology and required that the advertisement be revised as needed until the survey results showed that a minimum number or percentage of consumers actually took the intended educational message from the advertising spot. The Commission has taken this approach in the past. *RJR Foods, Inc.*, 83 FTC 7, 16-21 (consent order, July 13, 1973).

IN THE MATTER OF

## ROGERIO MONTEIRO, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3767. Complaint, Sept. 12, 1997--Decision, Sept. 12, 1997*

This consent order requires, among other things, the California Spanish-language advertisers to have scientific evidence to substantiate any claims they make concerning the benefits, efficacy or performance of any food, drug, cosmetic or dietary supplement. The consent order also prohibits the respondents from using certain names that represent that a product prevents or retards hair loss, unless they can substantiate that it does. In addition, the consent order prohibits the respondents from misrepresenting the existence or conclusions of any test, study or research.

### *Appearances*

For the Commission: *Thomas Carter* and *Susan Arthur*.

For the respondents: *Thomas Code, Reichard & Escalera,* San Juan, Puerto Rico.

### COMPLAINT

The Federal Trade Commission, having reason to believe that Rogerio Monteiro and Eliana Crema ("respondents"), owners of the business known as Leeka Products, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Rogerio Monteiro is owner of Leeka Products, a sole proprietorship with its principal place of business at 1614 South Central Avenue, Glendale, California. Individually or in concert with others, Rogerio Monteiro formulates, directs, or controls the policies, acts, or practices of Leeka Products, including the acts or practices alleged in this complaint. His principal place of business is the same as that of Leeka Products.

2. Respondent Eliana Crema is married to Rogerio Monteiro and is also an owner of Leeka Products. Individually or in concert with others, she formulates, directs, or controls the policies, acts or practices of Leeka Products, including the acts or practices alleged in this complaint. Her principal place of business is the same as that of Leeka Products.

3. Respondents have advertised, offered for sale, sold and distributed Super Formula Reductora, Crema Sudadora Perfect Shape, and Tratamiento para Combatir la Caida del Cabello. Super Formula Reductora is a "food" and/or a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Crema Sudadora Perfect Shape is a "cosmetic" and/or a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Tratamiento para Combatir la Caida del Cabello is a "cosmetic" and/or a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Super Formula Reductora, including but not necessarily limited to the attached Exhibits A-1 and B-1. Translations of these advertisements and promotional materials have been provided by the respondents and are attached as Exhibits A-2 and B-2. The translations of the advertisements and promotional materials contain the following statements:

A. Naturally Leeka
"Super Formula Reductora"
Was created to help you lose weight successfully by controlling the metabolism, reducing appetite and burning fat.
3 daily tablets contain:
Chromium Picolinate (200 mcg): Regulate metabolism and burn fat.
Cider Vinegar (240 mg): Dissolve fat.
Phenylalamine [sic] (100 mg): Reduce appetite.
Kelp (100 mg): Iodine Creator. Maintain optimum metabolism function.
Herbal Complex (600 mg): Reduce excess fluids.
Soya Lecithin (600 mg): Disperse fat globules in the body and maintain a low cholesterol level.
Vitamin B-6 (50 mg): Responsible for the metabolism of fat, carbohydrates and proteins.
(Exhibit A-2)

B. Super Formula Reductora
"Super Formula Reductora" was created to help you lose weight successfully by: Controlling the metabolism, reducing appetite and burninmg [sic] fat. S.F.R. is formulated with 7 super ingredients in a natural base, including the patented Chromium Picolinate, which has demonstrated in clinical studies to be very effective in weight loss.
3 daily tablets contain:
Chromium Picolinate (200 mcg): Regulate metabolism, burn fat.

Cider Vinegar (240 mg): Dissolve fat.
Phenylalamine (100 mg); [sic] Reduce appetite.
Kelp (100 mg): Iodine Creator - Maintain optimum metabolism function.
Herbal Complex (600 mg): Reduce excess fluids.
Soya Lecithin (600 mg): Disperse fat globules in the body and maintain a low cholesterol level.
Vitamin B-6 (50 mg): Responsible for the metabolism of fat, carbohydrates and proteins.
(Exhibit B-2)

6. Through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. Super Formula Reductora will control and regulate metabolism.
B. Super Formula Reductora will reduce appetite.
C. Super Formula Reductora will burn or dissolve fat.
D. Super Formula Reductora will cause weight loss.

7. Through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is false or misleading.

9. Through the means described in paragraph five, respondents have represented, expressly or by implication, that scientific studies of Chromium Picolinate demonstrate that Super Formula Reductora causes weight loss.

10. In truth and in fact, scientific studies of Chromium Picolinate do not demonstrate that Super Formula Reductora causes weight loss. Therefore, the representation set forth in paragraph nine was, and is, false or misleading.

11. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Crema Sudadora Perfect Shape, including but not necessarily limited to the attached Exhibits B-1 and C-1. A translation of Exhibit B-1 has been provided by the respondents and is attached as Exhibit B-2. A translation of the relevant portion of Exhibit C-1 is attached as

Exhibit C-2. The translations of the advertisements and promotional materials contain the following statements:

A. Crema Sudadora - Perfect Shape
To have a beautiful body and be in good physical shape is the desire of all people. Perfect Shape can help you obtain better results from your workout because Perfect Shape activates circulation producing a "better sweat" in the areas that need it the most.
Sweating burns calories which is essential to lose inches.
(Exhibit B-2)

B. Crema Sudadora
Perfect Shape
To have a beautiful body and be in good physical shape is the desire of all people. Perfect Shape can help you obtain better results from your workout because Perfect Shape activates circulation producing a "better sweat" in the areas that need it the most.
Burn more calories by sweating more.
(Exhibit C-2)

12. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Crema Sudadora Perfect Shape, including but not necessarily limited to the attached Exhibit D. This English language advertisement contains the following statements:

SWEAT IT OUT & GET IN SHAPE!
Designed to improve the sweating process during your dynamic workout. Right where you need it the most.
Burn more calories by sweating more.
Get lean faster.
Get the most from your workout.
(Exhibit D)

13. Through the means described in paragraphs eleven and twelve, respondents have represented, expressly or by implication, that:

A. Crema Sudadora Perfect Shape will cause better results from exercise.
B. Crema Sudadora Perfect Shape will increase the number of calories burned during exercise.
C. Crema Sudadora Perfect Shape will cause the user to get lean faster.

14. Through the means described in paragraphs eleven and twelve, respondents have represented, expressly or by implication,

that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made.

15. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made. Therefore, the representation set forth in paragraph fourteen was, and is false or misleading.

16. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Tratamiento para Combatir la Caida del Cabello ["Treatment to Fight Hair Loss"], including but not necessarily limited to the attached Exhibit B-1. A translation of this advertisement has been provided by the respondents and is attached as Exhibit B-2. A translation of the name of the product has also been provided by the respondents and is attached as Exhibit B-3. The translation of the advertisement contains the following statements:

Tratamiento para Combatir la Caida del Cabello [Treatment to Fight Hair Loss]
For Men and Women.
The most advanced treatment that combines 3 super products that help fight hair loss.
First Step (pre-shampoo): Contains Aloe and Biotin to leave hair clean, with body and texture.
Second Step: To deep clean scalp and pores.
Third Step: Increases blood flow to the scalp and nourishes the roots in a base of proteins, Biotin, Aloe and herbal extracts.
(Exhibits B-2 and B-3)

17. Through use of the trade name Tratamiento para Combatir la Caida del Cabello ["Treatment to Fight Hair Loss"] and through the means described in paragraph sixteen, respondents have represented, expressly or by implication, that Tratamiento para Combatir la Caida del Cabello will prevent or retard hair loss.

18. Through the means described in paragraph sixteen, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph seventeen, at the time the representation was made.

19. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph seventeen, at the time the representation was made.

Therefore, the representation set forth in paragraph eighteen was, and is, false or misleading.

20. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

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EXHIBIT A-1

EXHIBIT A-2

TRANSLATION

Naturally Leeka
"Super Formula Reductora"
Was created to help you lose weight successfully by controlling the metabolism, reducing appetite and burning fat.
3 daily tablets contain:
Chromium Picolinate (200 mcg): Regulate metabolism and burn fat.
Cider Vinegar (240 mg): Dissolve fat.
Phenylalamine (100 mg): Reduce appetite.
Kelp (100mg): Iodine Creator. Maintain optimum metabolism function.
Herbal Complex (600mg): Reduce excess fluids.
Soya Lecithin (600mg): Disperse fat globules in the body and maintain a low cholesterol level.
Vitamin B-6 (50mg): Responsible for the metabolism of fat, carbohydrates and proteins.
#101 30-day treatment $19.50 + shipping charges.
#102 60-day treatment $34.50 + shipping charges.
Toll free 1-800-505-3352 or 1-800-982-1090
Visa, Mastercard and C.O.D.
C.O.D.: Shipping charges paid upon delivery = $9.50
By mail: Send this coupon and a check/money order to:
Leeka Products
644 West Broadway, Suite 102
Glendale, CA 91204

| | |
|---|---|
| #101 One-month treatment | $19.50 |
| shipping charges | $ 5.00 |
| Total | $24.50 |
| #102 Two-month treatment | $34.50 |
| shipping charges | $ 5.00 |
| Total | $39.50 |

California residents add 8.25% tax:
product #101 add $1.61
product #102 add $2.85
Name, Address, City, State and Zip Code
Area Code and Telephone Number
We request distributors.
Take this great opportunity.
Start your own business, selling by catalogue.
Good profits, only dedicating some of your time.

f:/B/C/233-001.2DO

EXHIBIT B-1

EXHIBIT B-1

EXHIBIT B-2

TRANSLATION

Sublime Belleza
Now available to you a treatment for specific skin problems: Acne, black heads, pimples, and clogged pores.
This treatment is effective in the correction and restoration of the skin. Gently removes dead cells, impurities and bacteria from the surface of the skin.
Spectacular results ... The beauty treatment that your skin deserves. #682 $37.60
Super Formula Reductora
"Super Formula Reductora" was created to help you lose weight successfully by: Controlling the metabolism, reducing appetite and burning fat. S.F.R. is formulated with 7 super ingredients in a natural base, including the patented Chromium Picolinate, which has demonstrated in clinical studies to be very effective in weight loss.
3 daily tablets contain:
Chromium Picolinate (200 mcg): Regulate metabolism, burn fat.
Cider Vinegar (240 mg): Dissolve fat.
Phenylalamine (100 mg); Reduce appetite.
Kelp (100mg): Iodine Creator - Maintain optimum metabolism function.
Herbal Complex (600 mg): Reduce excess fluids
Soya Lecithin (600 mg): Disperse fat globules in the body and maintain a low cholesterol level.
Vitamin B6 (50mg): Responsible for the metabolism of fat, carbohydrates and proteins.
#101 $19.50
#102 2 for only $34.50
Tratamiento para Manchas de la Piel
Use this product to decolorate spots on your skin. Will also help to retard wrinkle formation and will maintain your skin young and luxuriant. This treatment can be used in the face, hands and other parts of the body.
Crema Sudadora - Perfect Shape
To have a beautiful body and be in good physical shape is the desire of all people. Perfect Shape can help you obtain better results from your workout because Perfect Shape activates circulation producing a "better sweat" in the areas that need it the most.
Sweating burns calories which is essential to lose inches.
#204 $12.50
#208 2 for only $20.50
#212 3 for only $29.50
Tratamiento para Combatir la Caida del Cabello
For Men and Women
The most advanced treatment that combines 3 super products that help fight hair loss.
First Step (pre-shampoo): Contains Aloe and Biotin to leave hair clean, with body and texture.
Second Step: To deep clean scalp and pores.
Third Step: Increases blood flow to the scalp and nourishes the roots in a base of proteins, Biotin, Aloe and herbal extracts. #403 $39.50

Aceite Rosa Mosqueta

This is unique oil is produced by a wild rose that grows in the fresh air of the mountains of Chile. Aceite Rosa Mosqueta has been studied by universities in Chile and laboratories in the United States and Germany. The studies identified the presence of trans-RETINIC acid which contains the properties of reducing scars and eliminating certain blemishes and wrinkles from the skin.

Recommended use: scars, premature aging, smoothing of fine wrinkles, stretch marks, minor burns.

100% Natural

#707 1 ounce for only $24.50

Super Potencia para Hombres

It is specifically formulated with vitamins, minerals, herbs and glandulars essential to the vitality of men.

For men who prefer having an active life!

1 daily tablet contains:

| | |
|---|---|
| L-Cartinine | 10mg |
| L-Histidine | 10mg |
| Raw testicular | 50mg |
| Damiana Leaf | 100mg |
| Siberian Ginseng | 100mg |
| Sarsaparilla Root | 100mg |
| Saw Palmeto Berries | 100mg |
| Niacin | 20mg |
| Pantothenic Acid | 10mg |
| Vitamin B6 | 2mg |
| Vitamin B12 | 6mg |
| Vitamin E | 30IU |
| Manganese | 7mg |
| Zinc | 15mg |

To order: Send a check or money order for the total amount of your order + $5.00 for shipping charges to:

Leeka Products

644 West Broadway, Suite 102

Glendale, CA 91204

(If you live in California, add $8.25 tax)

Please include your name, address and telephone number.

Visa/Mastercard 1-800-505-3352

We request distributors. Distributors call 1-800-505-3352

EXHIBIT B-3

#101 - Super Formula Reductora: *Super Reducing Formula*

#173 - Super Cellulite Control: *Super Cellulite Control*

#204 - Crema Sudadora Perfect Shape: *Perfect Shape sweating cream*

#403 - Tratamiento para Combatir la Caida del Cabello: *Treatment to Fight Hair Loss*

#423 - Super Potencia para hombres: *Super Potency for men*

#616 - Tratamiento para Manchas de la Piel: *Treatment for Skin Blemishes*

#682 - Sublime Belleza: *Sublime Beauty*

#707 - Aceite Rosa Mosqueta: *Rose Hips Oil*

EXHIBIT C-1

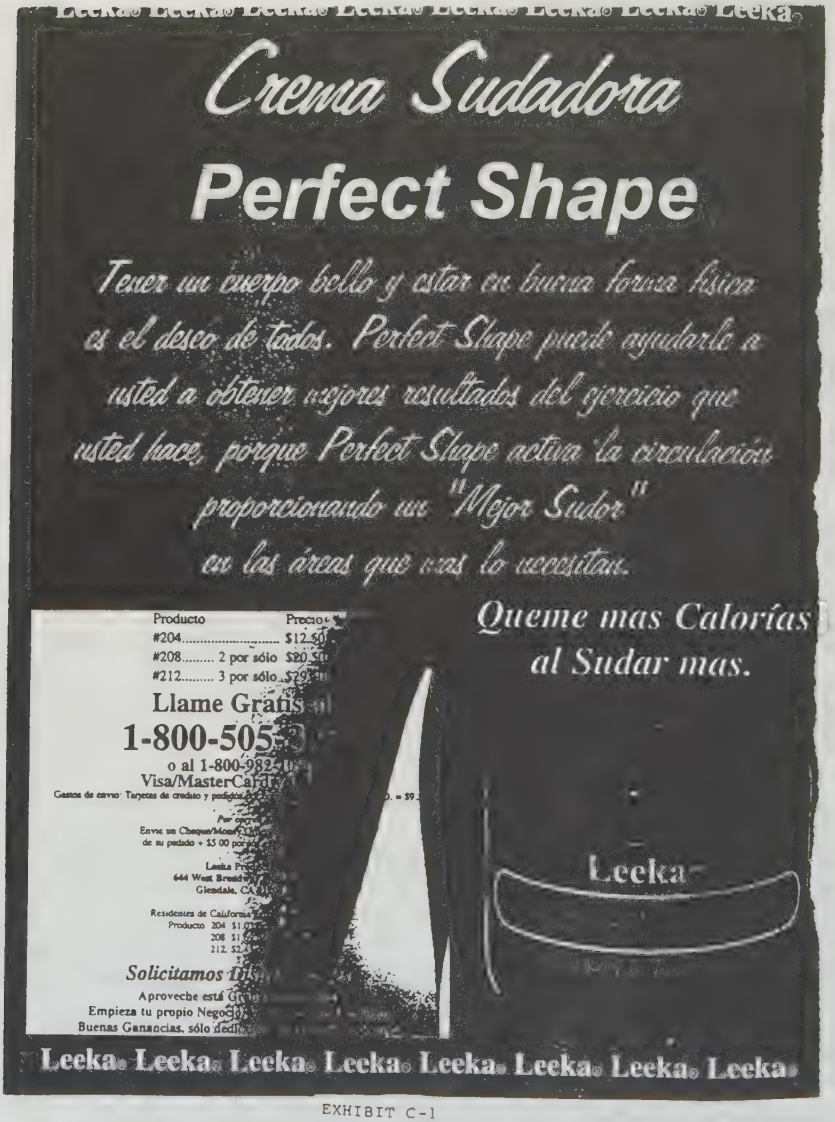

Leeka
Crema Sudadora
Perfect Shape
Tener un cuerpo bello y estar en buena forma física es el deseo de todos. Perfect Shape puede ayudarle a usted a obtener mejores resultados del ejercicio que usted hace, porque Perfect Shape activa la circulación proporcionando un "Mejor Sudor" en las áreas que mas lo necesitan.
Producto
#204
#208 2 por sólo
#212 3 por sólo
Llame Gratis
1-800-505
o al 1-800-983
Visa/MasterCard
Queme mas Calorías al Sudar mas.
Leeka
Leeka Leeka Leeka Leeka Leeka Leeka Leeka Leeka

EXHIBIT C-1

EXHIBIT C-2

Crema Sudadora
Perfect Shape
To have a beautiful body and be in good physical shape is the desire of all people. Perfect Shape can help you obtain better results from your workout because Perfect Shape activates circulation producing a "better sweat" in the areas that need it the most.
Burn more calories by sweating more.
[order form]

EXHIBIT D

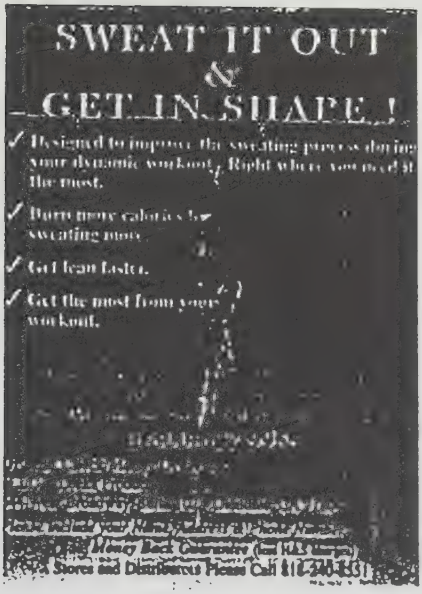

SWEAT IT OUT
&
GET IN SHAPE !
✓ Designed to improve the sweating process during your dynamic workout. Right where you need it the most.
✓ Burn more calories by sweating more.
✓ Get lean faster.
✓ Get the most from your workout.

EXHIBIT D

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint; or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1a. Respondent Rogerio Monteiro is owner of Leeka Products, a sole proprietorship with its principal office or place of business at 1614 South Central Avenue, Glendale, California.

1b. Respondent Eliana Crema is owner of Leeka Products, a sole proprietorship with its principal office or place of business at 1614 South Central Avenue, Glendale, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For the purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondents"* shall mean Rogerio Monteiro and Eliana Crema, individually and doing business as Leeka Products, and each of the above's agents, representatives, and employees.

3. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

*It is ordered*, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Super Formula Reductora, Crema Sudadora Perfect Shape, Tratamiento para Combatir la Caida del Cabello or any food, dietary supplement, cosmetic or drug, as "food," "cosmetic" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

A. Such product controls and regulates metabolism;
B. Such product reduces appetite;
C. Such product burns or dissolves fat;
D. Such product causes better results from exercise;
E. Such product increases calories burned during exercise;
F. Such product provides any weight loss, fat loss, weight regulation, weight control, or weight maintenance benefits; or
G. Such product will prevent or retard hair loss

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

*It is further ordered*, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any hair care product or drug, as "drug" is defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent that any product prevents hair loss, unless the product is the subject of an approved new drug application for such purpose under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, provided that, this requirement shall not limit the requirements of Order Part I herein.

III.

*It is further ordered*, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Super Formula Reductora, Crema Sudadora Perfect Shape, Tratamiento para Combatir la Caida del Cabello or any other food, dietary supplement, cosmetic or drug, as "food," "cosmetic" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

*It is further ordered*, That respondents directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Tratamiento para Combatir la Caida del Cabello or any substantially similar product in or affecting commerce, shall not use the name "Tratamiento para Combatir la Caida del Cabello" or any other name that represents, expressly or by implication, that the product will prevent or retard hair loss, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

V.

*It is further ordered*, That respondents directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

VI.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VII.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VIII.

*It is further ordered*, That respondents, and their successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with

consumers or with governmental or consumer protection organizations.

IX.

*It is further ordered*, That respondents shall deliver a copy of this order to all current and future principals, partners, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

*It is further ordered*, That respondents, and their successors and assigns, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in Leeka Products that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the company name or address. Provided, however, that with respect to any proposed change in the company about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

*It is further ordered*, That respondent Rogerio Monteiro, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment or of his affiliation with any new business or employment which involves the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary

supplement, cosmetic or drug, as "food," "cosmetic" and "drug" are defined in Section 15 of the Federal Trade Commission Act. The notice shall include respondent's new business address and telephone number, and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XII.

*It is further ordered*, That respondent Eliana Crema, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of her current business or employment or of her affiliation with any new business or employment which involves the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, cosmetic or drug, as "food," "cosmetic" and "drug" are defined in Section 15 of the Federal Trade Commission Act. The notice shall include respondent's new business address and telephone number, and a description of the nature of the business or employment and her duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIII.

*It is further ordered*, That respondents shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIV.

This order will terminate on September 12, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

# EFFICIENT LABS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3768. Complaint, Sept. 12, 1997--Decision, Sept. 12, 1997*

This consent order requires, among other things, the Puerto Rico-based Spanish-language advertiser of dietary supplements and its officer to have scientific evidence to substantiate any claims they make concerning the health benefits, performance, safety or efficacy of any food, drug, cosmetic or dietary supplement promoted or used to treat conditions or illnesses related to the circulatory system.

## *Appearances*

For the Commission: *Michael Bloom, Donald D'Amato* and *Denise Tighe.*

For the respondents: *Jose Acosta-Grubb, Fiddler, Gonzalez & Rodriquez*, San Juan, Puerto Rico.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Efficient Labs, Inc., a corporation, and Blas Reyes-Reyes, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Efficient Labs, Inc. is a corporation organized under the laws of the Commonwealth of Puerto Rico, with its principal office or place of business at 413 San Jorge Street, San Juan, Puerto Rico.

2. Respondent Blas Reyes-Reyes is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, participates in, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Efficient Labs, Inc.

3. Respondents have advertised, offered for sale, sold, and distributed products to the public, including "Venoflash," a nutritional supplement with ingredients that include Niacin U.S.P.; Vitamins

B-1, B-6, B-12, C, and E; and various plant derivatives. Venoflash purportedly, among other things, treats the symptoms of varicose veins and hemorrhoids. "Venoflash" is a "food" and/or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52,55.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated or have caused to be disseminated print and television advertisements for Venoflash that have appeared in Miami's El Nuevo Herald, and have been broadcast and cablecast on Telemundo de Puerto Rico, Univision 41(WXTV-New York), Telemundo (T47/WNJU New York), Univision 23 (WLTV-Miami), and Telemundo de Florida. These print and television advertisements, including but not necessarily limited to the attached Exhibit A (transcript of a television advertisement), contain the following statements:

"Clogged, Clogged, Clogged!
When your blood circulation feels like it's clogging, look for the Venoflash aid.
If you suffer from varicose veins, Venoflash can help you!
If you suffer from hemorrhoids, Venoflash can help you!
To order, 1-800-272-8964.
Venoflash can help if your extremities become numb as a result of problems in your veins and capillaries.
Defend yourself from those dangerous clogs in your circulatory system and recover your lost agility taking Venoflash.
Venoflash can help you!"
(Exhibit A)

6. Through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. Venoflash removes dangerous clogs in the circulatory system;
B. Venoflash treats the symptoms of varicose veins; and
C. Venoflash treats the symptoms of hemorrhoids.

7. Through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph six at the time the representations were made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph six at the time the representations were made. Therefore,

the representation set forth in paragraph seven was, and is, false or misleading.

9. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

## EXHIBIT A

## VENOFLASH TV COMMERCIAL SCRIPT

TAPON, TAPON, TAPON!
Clogged, Clogged, Clogged!

CUANDO SE PRODUCEN TAPONES EN LA CIRCULACION DE LA SANGRE, BUSQUE LA AYUDA DE VENOFLASH.
When your blood circulation feels like it's clogging, look for the Venoflash aid.

SI SUFRE DE VARICES, VENOFLASH PUEDE AYUDARLE!
If you suffer from varicose veins. Venoflash can help you!

SI PADECE DE HEMORROIDES, VENOFLASH PUEDE AYUDARLE!
If you suffer from hemorrhoids. Venoflash can help you!

PARA ORDENAR, 1-800-272-8964.
To Order, 1-800-272-8964.

VENOFLASH PUEDE AYUDARLE SI SE LE ADORMECEN LAS EXTREMIDADES POR PROBLEMAS EN SUS VENAS Y CAPILARES.
Venoflash can help if your extremities become numb as a result of problems in your veins and capillaries.

DEFIENDASE DE ESOS PELIGROSOS TAPONES EN SUS SISTEMA CIRCULATORIO Y RECUPERE SU AGILIDAD PERDIDA TOMANDO VENOFLASH.
Defend yourself from those dangerous clogs in your circulatory system and recover your lost agility taking Venoflash.

VENOFLASH PUEDE AYUDARLE!
Venoflash can help you!

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Efficient Labs, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its office and principal place of business located at 413 San Jorge Street, San Juan, Puerto Rico.

Respondent Blas Reyes-Reyes is an officer and director of the corporate respondent. Mr. Reyes-Reyes, individually or in concert with others, formulates, directs, and controls the policies, acts, and practices of said corporation, and his business address is the same as that of the said corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondents"* shall mean Efficient Labs, Inc., a corporation, its successors and assigns and its officer; Blas Reyes-Reyes, individually and as an officer of the corporation; and each of the above's agents, representatives and employees.

3. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

*It is ordered*, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of "Venoflash" or any other product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product:

A. Removes dangerous clogs in the circulatory system;
B. Treats the symptoms of varicose veins; or
C. Treats the symptoms of hemorrhoids.

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

*It is further ordered*, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Venoflash or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, promoted or used

to treat conditions or illnesses related to the circulatory system, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the health benefits, performance, safety, or efficacy of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in the labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

IV.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

*It is further ordered*, That respondent Efficient Labs, Inc., and its successors and assigns, and respondent Blas Reyes-Reyes shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

*It is further ordered*, That respondent Efficient Labs, Inc. and its successors and assigns, and respondent Blas Reyes-Reyes, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

*It is further ordered*, That respondent Efficient Labs, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

*It is further ordered*, That respondent Blas Reyes-Reyes, for a period of seven (7) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All

notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

IX.

*It is further ordered*, That respondent Efficient Labs, Inc., and its successors and assigns, and respondent Blas Reyes-Reyes shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

X.

This order will terminate on September 12, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

# KENT & SPIEGEL DIRECT, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3769. Complaint, Sept. 18, 1997--Decision, Sept. 18, 1997*

This consent order requires, among other things, the California-based infomercial company and its officers, who marketed the Abflex abdominal exerciser, to have competent and reliable evidence for future claims regarding weight loss and the benefits, efficacy or performance of such a product in promoting weight loss. In addition, the consent order requires that the testimonials in the respondents' advertisement and infomercial either represent the typical experience of users, or include disclosures of the generally expected results or that users should not expect similar results.

## *Appearances*

For the Commission: *Kerry O'Brien* and *Jeffrey Klurfeld.*

For the respondents: *Barry J. Cutler* and *Julia A. Oas, McCutchen, Doyle, Brown & Enersen,* New York, N.Y. and *Arthur Herold, Webster, Chamberlain & Bean*, New York, N.Y.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Kent & Spiegel Direct, Inc., a corporation, and Marsha Kent and Peter Spiegel, individually and as officers of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Kent & Spiegel Direct, Inc. is a Delaware corporation with its principal office or place of business at 6133 Bristol Parkway, Suite 150, Culver City, California.

2. Respondent Marsha Kent is an officer of the corporate respondent. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. Her principal office or place of business is the same as that of Kent & Spiegel Direct, Inc.

3. Respondent Peter Spiegel is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation,

including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Kent & Spiegel Direct, Inc.

4. Respondents have advertised, labeled, offered for sale, sold, and distributed weight-loss and body-shaping products to the public, including the "Abflex," an abdominal exercise device.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

6. Respondents have disseminated or have caused to be disseminated advertisements for the Abflex, including but not necessarily limited to the attached Exhibits A through E. These advertisements contain the following statements:

A. ["The Abflex Home" page (Exhibit A2)]
"Welcome to abflex YOU ARE SECONDS AWAY FROM THE ABS YOU'VE ALWAYS WANTED
WHAT CAN ABFLEX DO FOR YOU?
SEE WHY ABFLEX IS THE BEST MACHINE FOR ABS
WHO USES ABFLEX?
DON'T BELIEVE US? WATCH THIS! ...."
["What can Abflex do for you?" page (Exhibits A3-A4)]
"If you spend 3 minutes a day with the ABFLEX, you will have firm, tight abs. We guarantee it.
The ABFLEX Guarantee:
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund.
HERE'S HOW:
ABFLEX uses four basic exercises to guarantee you the maximum results: ...."
["See why Abflex is the best machine for abs" page (Exhibits A5-A7)]
"Q&A
How do I know ABFLEX really works?
The ABFLEX Guarantee!!!
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund. ...."
["Who uses Abflex" page (Exhibit A8)]
"Who uses ABFLEX?
The question is: Who DOESN'T use ABFLEX to achieve tighter firmer abs?
Join an all-star line-up of celebrities, professional athletes, fitness experts and hundreds of thousands of people across the country and discover the fast, safe way to a firm stomach, a slim waistline and a healthy back.... Besides celebrity users, there are hundreds of thousands of people-- people like you and me -- who simply want the sexiest and flattest abs possible with only 3 minutes a day of exercise. Just look at what people like you are saying about ABFLEX: ....
The ABFLEX Guarantee:
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund"

["Just look at what people like you are saying about Abflex" page (Exhibit A9)]
"ABFLEX WORKS!!
If you don't lose 5 inches and 10 pounds within 30 days, you can return ABFLEX for a full refund."
Consumer endorser: "I Lost 12 inches"
Consumer endorser: "I Lost 6 inches in 30 Day [sic]"
[The advertisement depicts before-and-after photographs of the two consumers.]
["Don't believe us? Watch this!" page (Exhibit A10)]
"....
The ABFLEX Guarantee:
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund." (Exhibit A: Internet Advertisement).

B. "FLATTEN YOUR STOMACH IN JUST 3 MINUTES A DAY!* ABFLEX...The Fast, Easy Way to a Flat Stomach, Shapely Waistline, and a Healthy Back.
* 4 days a week if you follow the workout program."
Celebrity endorser: "I look better than I ever have! I workout less, and I eat more, all because of the Abflex."
"Home Exercise Machine That Works The Upper, Lower, & Side Abdominals With 1 SIMPLE EXERCISE!
Flatten your abs with the Abflex. Because the abdominals are non-jointed muscles, direct resistance is the way to work-out these non-jointed muscles. Abflex's patented direct resistance design zeros right in on those hard to target abdominal muscles. The result: You can have a firm flat stomach, and a slim waistline in just 3 minutes a day, 4 days a week! ....
The Abflex targets the abs much better than sit-ups; it doesn't strain your back like sit-ups, and you don't even have to get on the floor to use it! It's so effective, you can see dramatic results in just a few short weeks....
INCLUDED: A 1-hour LIFESTYLE FITNESS VIDEO which is like 3 great videos in 1:
1. It's an instructional tape that demonstrates your "3 minutes flat" Abflex workout. 2. It's a 20-minutes aerobics tape. 3. It's a guide to safe-back exercise.
Plus, you'll receive a 250-page Abflex nutritional guide, which lists over 2000 low-fat foods, and gives you more than 90 delicious, healthy recipes.
And most importantly, you get the Abflex guarantee: If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the Abflex for a full refund." (Exhibit B).

C. "RECOMMENDED BY ORTHOPEDIC DOCTORS TO FIRM STOMACH AND IMPROVE LOWER BACK PERFORMANCE!
ABFLEX™
The unique Abflex™ System will provide you with the most complete abdominal workout available anywhere! With an excellent step-by-step video ..., you'll perform a routine that gradually works up to ab-isolating floor crunches. For cardiovascular fitness, there's exciting low-impact aerobics .... Plus a sensible eating program that provides plenty of eating satisfaction. Best of all, Abflex™ flattens your stomach in just 3 minutes a day - no matter what your current fitness level!"
Includes:
* Abflex™
* Medium and Light Resistance Bands and Accessories
* 270-Page Abflex™ Lifestyle Eating Program Book
* Instructional Video" (Exhibit C).

D. "GET A FLAT, SEXY STOMACH IN JUST 3 MINUTES A DAY!
While You Sit In A Chair or Even Watch TV!
ABFLEX®
The Fastest, Easiest,
Safest Way Ever
To Achieve:
A flat, toned stomach
A shapelier waistline
A healthier back
HERE'S THE MAGIC OF ABFLEX:
Only the ABFLEX patented direct resistance design targets all the abdominal muscles simultaneously in one easy exercise to:
* Flatten a bulging tummy
* Eliminate a spare tire * Trim the waistline
* Get rid of those "love handles" at the sides of the waist with its special attachment"
Consumer endorser: "Lost 3 inches and 13 pounds in 30 Days!"
[The advertisement depicts before-and-after photographs of a consumer.]
"DRAMATIC RESULTS IN JUST A FEW WEEKS... AND NO BACK STRAIN!
....
ALL THIS FOR JUST 3 EASY PAYMENTS OF $19.95
The Revolutionary New ABFLEX System, plus the 1-hour ABFLEX Lifetime Fitness Instructional Video and the 250 page ABFLEX Nutritional guide which lists over 2,000 low-fat foods and gives you over 90 delicious recipes!
....
ABFLEX NO RISK GUARANTEE
If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX System for a full refund of your purchase price! You have nothing to lose but your paunch!"
The advertisement contains a statement at the bottom, left-hand corner, in approximately 4-point type: "The ABFLEX System includes a low-fat diet and aerobic exercise. The results may vary." (Exhibit D).

E. "Male Narrator 1: Does your stomach look like this?
[The advertisement depicts stomachs of three obese individuals. Superscript: "Does Your Stomach Look Like This?]
In just a few minutes a day, it could look like this.
[The advertisement depicts three individuals with flat stomachs and slim waistlines. Superscript: "It Could Look Like This."]
[Superscript: "If You Start Using This."]
If you start using this. It's the revolutionary ABFLEX ...
[Superscript: "Abflex"]
... and it's so easy to use....
[The advertisement depicts before and after photographs of a consumer. Superscript: "Your results may vary"]
....
Van Allen: We're talking tummies, gang. How do we firm 'em up and slim 'em down.
Sometimes it seems hopeless, right? But today we're going to hear about a new machine called the Abflex. Well, they say it can flatten our stomachs in just a few minutes a day....

Jennilee Harrison: And let's look at the results some of these people got after just a few weeks on the Abflex System.
[The advertisement depicts before-and-after photographs of a consumer. Superscript: "Lost 13 lbs in 30 days. The Abflex program includes a low-fat diet and aerobic exercise."]

[The advertisement depicts before-and-after photographs of a consumer. Superscript: "Lost 6 inches in 30 days. Your results may vary."]
Van Allen: Hey you guys, look at the difference.
Jennilee Harrison: And it can work for anybody. Just three minutes a day and you can flatten that tummy right up.
Van Allen: That sounds great."
Consumer endorser: "You don't even know you are doing, you don't even know you are doing your exercises. And you're doin' it the whole time and pretty soon your stomach is like a brick. And you've lost all that weight."
[Superscript: "The Abflex program includes a low-fat diet and aerobic exercise. Your results may vary."]

Consumer endorser: "After using the Abflex 30 days I lost two inches off my waist and I lost 13 lbs. so I went from a size 36 slacks back to a 34. Perfect."
[Superscript: "The Abflex program includes a low-fat diet and aerobic exercise. Your results may vary."]

"Jennilee Harrison: And for us women who are trying to get rid of that pooch down here and for you guys trying to get rid of the love handles, forget it. This exercise [abdominal crunch] is useless. But, now here, this is the answer. This is the Abflex crunch

Jennilee Harrison: Well you can have it. Look at this woman. If you'd like to go down a few sizes, the Abflex System is the fast way to lose those inches."
[The advertisement depicts before-and-after photographs of a consumer. Superscript: "Lost 6 inches in 30 days. Best case results. Your results may vary."]
Consumer endorser: ".... Well I think in about 21 days I've, I've lost about 2 inches."
[Superscript: "The ABFLEX program includes a low fat diet and aerobic exercise."]
Consumer endorser: "After 30 days I lost a full 6 inches...."
[Superscript: "Your results may vary"]
Consumer endorser: "Four and half inches I lost. I was 39 ½ and went down to 35. Boom, just like that."
Consumer endorser: "With the Abflex I have lost 5 to 6 inches within 30 days and I have seen the results and so has everybody else. It works great."

"Announcer: ... it's so effective you can see dramatic results in just a few weeks."
[The advertisement depicts a woman demonstrating how many inches she has lost around her waist by wearing jeans, which now are too large for her around the waist. Superscript: "Dramatic Results in a Few Weeks"]
Consumer endorser: "Within, I would say, the third or fourth day that I started using it I started noticing tightening, firmness and my pants had started loosening up a little. I kept continuing using it and before I knew it I was back to a 5/6 from a 9/10. It was very dramatic."
[Superscript: "Your results may vary."]

"Announcer: ... you get the Abflex Guarantee. If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX for a full refund of your purchase price. The Abflex, it's the fast way to a flat stomach, a shapely waistline, and a healthy back."
[The advertisement depicts a woman demonstrating how many inches she has lost around her waist by wearing jeans, which now are too large for her around the waist. Superscript: "Abflex GUARANTEE If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX for a full refund."]
....
Consumer endorser: "I saw results in the first five to seven days. I could see visual results of the Abflex program. I lost about an inch to an inch-and-a-half in the waist and also lost five pounds...."
[Superscript: "Your results may vary"]
....
Van Allen: ... The Abflex definitely works.
Jennilee Harrison: And it can work for anyone.
[The advertisement depicts before and after photographs of a consumer. Superscript: "Lost 12 Inches. The Abflex program includes a low-fat diet and aerobic exercise."]
Jennilee Harrison: Think about how great you're going to feel when you start using the Abflex...
[The advertisement depicts before and after photographs of a consumer. Superscript: "Lost 13 lbs in 30 days. The Abflex program includes a low-fat diet and aerobic exercise."]
Jennilee Harrison: ...and you start losing those inches.
[The advertisement depicts before and after photographs of a consumer. Superscript: "Lost 6 inches in 30 days. Best case results. Your results may vary."]
Jennilee Harrison: Think about how great you're going to feel when you look terrific in your jeans again. Anybody can have a great body; the Abflex makes it easy.
Martin Van Der Hoeven: And I guarantee results. If you don't lose three to six inches and 10 pounds within 30 days, you can return the Abflex for a full refund.
Jennilee Harrison: It only takes three minutes a day to flatten your tummy....
Van Allen: We can all spare three minutes to get rid of our spare tires, .... It can flatten our stomachs, it can slim our waistlines, ...." (Exhibit E).

7. Through the means described in paragraph six, respondents have represented, expressly or by implication, that:

A. The Abflex causes fast and significant weight loss.

B. Consumers lose at least ten pounds and five inches, or three to six inches, off their waistline within thirty days by using the Abflex for just three minutes a day.

C. The Abflex causes weight loss and fat reduction in specific, desired areas of the body.

D. Testimonials from consumers appearing in the advertisements for the Abflex reflect the typical or ordinary experience of members of the public who use the product.

8. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

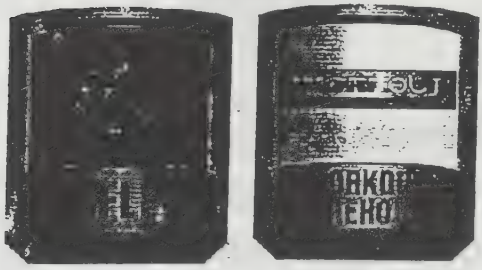
EXHIBIT A

Shopping Stores

http://www.tvshopping.com/

# Directory

Choose Store Below



If you would like more information on how to be a merchant, please e-mail Webmaster@tvshopping.com

EXHIBIT A

bflex Home Page http://tvshopping.com/abflex/

*Welcome to ABFLEX*

**YOU ARE SECONDS AWAY FROM**

* **THE ABS YOU'VE ALWAYS WANTED**

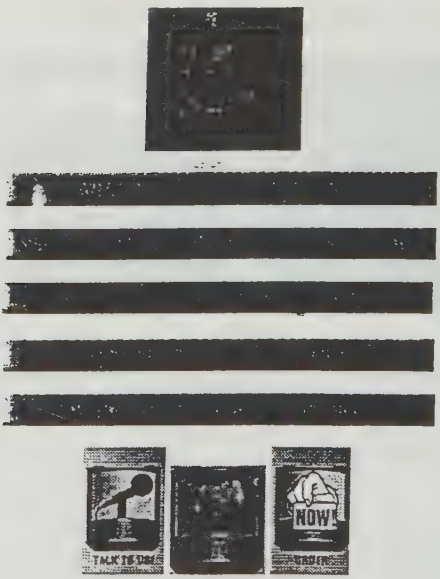



EXHIBIT A-2

EXHIBIT A

Minutes a Day http://tvshopping.com/abflex/page1.html

**If you spend 3 minutes a day with the ABFLEX, you will have firm, tight abs.**

# *We guarantee* it.

**The ABFLEX Guarantee :**
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund.

---

## HERE'S HOW:

ABFLEX uses four basic exercises to guarantee you the maximum results:

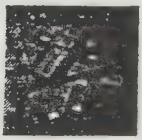
*I.* The Tummy Crunch tightens your stomach and slims your waist.

*II.* Advanced Pull-In offers you a progressive resistance which, combined with the floor crunch position, blasts you to the firmest possible abs.

*III.* The side crunch slims and strengthens the side and oblique abs

EXHIBIT A

Minutes a Day http://5.shopping.com/abflex/page1.htm



ABFLEX Homepage | Order Information

EXHIBIT A-4

EXHIBIT A

http tvshopping com abflex page1 html

EXHIBIT A-5

# EXHIBIT A

## Q & A

How do I know ABFLEX really works? ⇓

The ABFLEX Guarantee!!!
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund.

Who needs ABFLEX? ⇓

Any one who wants a sexy, flatter stomach in just 3 minutes a day. Who doesn't want to look sexier with a better physique?

How does it compare to other equipment? ⇓

If you can prove another fitness product can target the abs better than ABFLEX you will receive a $100,000 from ABFLEX.

How does ABFLEX work? ⇓

Other than the heart, the abs are the only muscles in your body that aren't connected to any joints. That's why they're almost impossible to target.
The only way to target them is with direct resistance.
Most people have never really worked their abs in their entire life until they've used the ABFLEX.

What about sit-ups and crunches? ⇓

With sit-ups, you're bending the hip joint so you're working the hip flexor muscles, but you're hardly working the abs at all. Worst of all, 90% of the stress goes right to your lower back. Doctors will tell you sit ups do more harm than good.
And crunches only work the upper abs - not the lower abs or the sides. Therefore, to flatten the bulge or the love handles, it is useless to do crunches.

What is the ABFLEX made of? How much does it weigh? ⇓

ABFLEX is made of sturdy plastic and weighs approximately 5 pounds.

EXHIBIT A

Is ABFLEX built to last? ⇓

ABFLEX is guaranteed for one year on parts...but it is built so tough it should last well past 5 years!

Will ABFLEX work my arms? ⇓

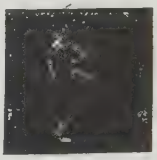
ABFLEX is a terrific all around upper body workout. In addition to giving you rock hard abs, ABFLEX will help tone your biceps, lats and pectoral muscles.

EXHIBIT A-1

EXHIBIT A



# Who uses ABFLEX?



The question is: Who *DOESN'T* use *ABFLEX* to achieve tighter firmer abs?

Join an all-star line-up of celebrities, professional athletes, fitness experts and hundreds of thousands of people across the country and discover the fast, safe way to a firm stomach, a slim waistline and a healthy back. *ABFLEX* is used by thousands every day to give them a real advantage in their exercise program.

You may have seen our recent nationally aired TV show showing the benefits of *ABFLEX*. The show is hosted by two devoted users of *ABFLEX*: Television star Jennilee Harrison (the costar of Dallas and Three's Company) and Martin Van Der Hoeven, the inventor of *ABFLEX*.

In fact, Jennilee believes in the results she has gotten so much she has become the spokesperson for the company.

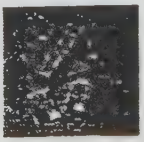
Martin van Der Hoeven the inventor of *ABFLEX* developed his drum tight abdomen in only two months using the ABFLEX System.

Besides celebrity users, there are hundreds of thousands of people-- people like you and me -- who simply want the sexiest and flattest abs possible with only 3 minutes a day of exercise. Just look at what people like you are saying about *ABFLEX*.

To get abs in 3 minutes that you can only usually get in 45 minutes, order your own *ABFLEX* today. (radio button that clicks the user to the order page)

## The *ABFLEX* Guarantee :

If you don't lose 5 inches and 10 pounds within 30 days, you can return the *ABFLEX* for a full refund



ABFLEX

Order

EXHIBIT A-3

EXHIBIT A



# *ABFLEX WORKS!!*

If you don't lose 5 inches and 10 pounds within 30 days, you can return ABFLEX for a full refund.

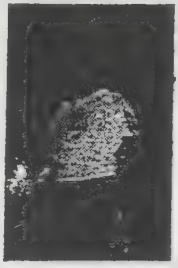
"I Lost 12 inches "

## See What and Hear What People Are Saying About the ABFLEX!!

Customer 1–Qtime, Avi
Customer 2–Qtime, Avi
Customer 3–Qtime, Avi

---

"I Lost 6 inches in 30 Day"



ABFLEX Homepage

Order Information

EXHIBIT A

..y smashed on a users stomach. Unbelievable!!! http://tvshopping.com/abflex/page3.htm

Click here Quicktime, Avi to see a loyal *ABFLEX* customer have an actual cinder block smashed on his stomach with a sledge hammer. It will make a believer of you!

# The ABFLEX Guarantee :

If you don't lose 5 inches and 10 pounds within 30 days, you can return the *ABFLEX* for a full refund.

ABFLEX Homepage

Order Information

EXHIBIT A-10

EXHIBIT A



# ABFLEX

THE FASTEST, EASIEST,
SAFEST WAY EVER
TO ACHIEVE:

- **A flat, toned stomach**
- **A shaplier waistline**
- **A healthier back**

**The Complete**
**ABFLEX SYSTEM**

ALL THIS FOR JUST 3 EASY PAYMENTS OF
**~~$19.95~~**

The revolutionary new **ABFLEX** System plus the 1-hour **ABFLEX LIFETIME** Fitness Instructional Video and the 250-page **ABFLEX** Nutritional Guide which lists over 2,000 low-fat foods and gives you over 90 delicious recipes!

Call 800-293-7100 to order NOW

**MAIL CHECK**

**PURCHASE ONLINE**

ABFLEX Homepage

EXHIBIT A

Mail Order Form http://tvshopping.com/abf_ex.mail.html

## Check Orders

I prefer to send the full amount now. Enclose $59.85 plus $7.95 S&H. Total $67.80.

I want to target my side abs for faster trimmer waistline. Please add your special attachment and instructional video. Enclose a total of $80.70

TX res. add 8%, CA res. add 8.25% sales tax. Check Money Order

Print

Name
Address Apt#
City State Zip

Mail to: ABFLEX, Box 6015, Culver City, CA 90233

ABFLEX Homepage

EXHIBIT A-12

EXHIBIT A

bflex Order Form http tvshopping com/abflex order html

# ABFLEX ORDER FORM
# TO ORDER ON-LINE

## On-Line Credit Card Orders

YES! Please rush my **ABFLEX** with a no-risk money-back guarantee!

Charge my credit card for 3 easy payments of only $19.95 each plus $7.95 S&H (4-6 wk delivery)

Charge my credit card for full amount of $59.85 plus $7.95 S&H and *receive free express handling* (2 week delivery)

I want to target my side abs for a faster trimmer waistline, please add your special attachment and instructional video. Charge my credit card an additional $9.95 plus $2.95 S&H.

Martin VanDerHoeven, the inventor of the Abflex, would like you to try *for free* an incredible new all natural weight loss product. A recent scientific study showed that the regular use of this quick slimming formula safely produced a greater level of weight loss, reduced appetite, fewer cravings for sweets and increased energy. Martin will send you a 30-day supply *free* for two weeks. If you choose to keep SlimQuick, your accounts will be charged $14.95 plus $2.95 shipping and handling. So that you never run out, a new bottle will be sent approximately every four weeks and, of course you keep only the bottles you want. Check this paragraph to add to your order.

First Name:
Last Name:

Address: Apt:

City: State:
Zip:

Daytime Telephone:
Evening Telephone:

Email Address:

Credit Card: American Express Visa Mastercard

EXHIBIT A-11

## EXHIBIT A

Abflex Order Form

Card Number:

Expiration Date:

ABFLEX Homepage

EXHIBIT A-14

EXHIBIT A

bflex Order Form http://tvshopping.com/abflex/order.html

# ABFLEX ORDER FORM
# TO ORDER ON-LINE

## On-Line Credit Card Orders

YES! Please rush my ABFLEX with a no-risk money-back guarantee!

Charge my credit card for 3 easy payments of only $19.95 each plus $7.95 S&H (4-6 wk delivery)

Charge my credit card for full amount of $59.85 plus $7.95 S&H and *receive free express handling* (2 week delivery)

I want to target my side abs for a faster trimmer waistline, please add your special attachment and instructional video. Charge my credit card an additional $9.95 plus $2.95 S&H.

Martin VanDerHoeven, the inventor of the Abflex, would like you to try *for free* an incredible new all natural weight loss product. A recent scientific study showed that the regular use of this quick slimming formula safely produced a greater level of weight loss, reduced appetite, fewer cravings for sweets and increased energy. Martin will send you a 30-day supply *free* for two weeks. If you choose to keep SlimQuick, your accounts will be charged $14.95 plus $2.95 shipping and handling. So that you never run out, a new bottle will be sent approximately every four weeks and, of course you keep only the bottles you want. Check this paragraph to add to your order.

First Name:
Last Name:

Address: Apt:

City: State:
Zip:

Daytime Telephone:
Evening Telephone:

Email Address:

Credit Card: American Express Visa Mastercard

EXHIBIT A-15

## EXHIBIT A

Ablex Order Form

Card Number:

Expiration Date:

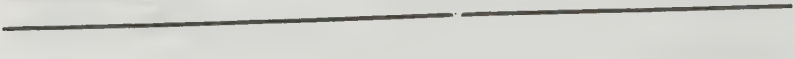







EXHIBIT A-16

EXHIBIT B

Shell credit card application July 1, 1995

FLATTEN YOUR STOMACH

IN JUST 3 MINUTES A DAY!*



ABFLEX...the fast, Easy Way to a flat Stomach, Shapely Waistline, and a Healthy Back

*4 days a week if you follow the workout program.

FREE 21-Day Home Trial

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

BUSINESS REPLY MAIL
FIRST CLASS MAIL PERMIT NO 609 ELMHURST, IL

POSTAGE WILL BE PAID BY ADDRESSEE

SHELL MERCHANDISE CENTER
489 W FULLERTON AVE
ELMHURST IL 60126-9484

MOISTEN HERE. FOLD SEAL AND RETURN POSTAGE-PAID.

100% SATISFACTION GUARANTEED

-FREE FOR 21 DAYS-NO OBLIGATION TO BUY-

| How Many? | Item # | Description | 10 Monthly Payments* | Single Payment | Shipping & Handling |
|---|---|---|---|---|---|
| | 4099 | ABflex Exercise Equipment | $59.90 | $599.90 | $7.95 |

*Plus FINANCE CHARGE and applicable taxes on your Shell account (See MERCHANDISE TERMS section). Shell reserves the right to change payment terms at any time by the enclosed letter. Shell reserves the right to approve all orders. Orders subject to routine credit approval.

Free 21 Day Home Trial and
Double Satisfaction Guaranteed

Only Shell gives you this double assurance. Try our merchandise FREE for 21 days with no obligation to buy. If for any reason you should become dissatisfied with the merchandise, return it in original condition and we will refund your money. You may return it for a complete refund even after you buy. You can return it for a complete refund even after you buy. This total protection allows you to buy with complete peace of mind and confidence.

Please allow 4-6 weeks for delivery.

Send no money. Your Shell account will be billed.
My Shell account number is (first 8 digits)

(Please print name as shown on monthly statement)

NAME:

STREET NUMBER STREET NAME APT. NO.

CITY STATE ZIP

Signature of person placing order. (Must be signed to be valid.)
X

In case merchandise for credit or replacement, your merchandise comes with a hand-Please do not send merchandise to the above address. Send it via United Parcel Service or insured U.S. Parcel Post. We cannot be responsible for shipments sent to the above address. Send it to the address provided on the invoice.

The merchandise is sold on the promotional terms and is shipped by Consolidated Marketing, Inc. unless provided otherwise. Prices subject to change without notice.

SBIP 1995

4326 SB

Offer expires October 31, 1995. Made in the U.S.A.

Montgomery Ward November, 1995

Amoco November, 1995

EXHIBIT B

# Home Exercise Machine That Works The Upper, Lower, & Side Abdominals With 1 SIMPLE EXERCISE!

ABFLEX

Flatten your abs with the Abflex. Because the abdominals are non-jointed muscles, direct resistance is the way to work out these non-jointed muscles. Abflex's patented direct resistance design zeros right in on those hard to target abdominal muscles. *The result: You can have a firm flat stomach, and a slim waistline in just 3 minutes a day, 4 days a week!*

The Abflex isolates and strengthens the abdominal muscles, without putting excessive stress on the lower back muscles. In fact, by strengthening your abdominals, it may help relieve existing lower back stress and pain.

The Abflex targets the abs much better than sit-ups; it doesn't strain your back like sit-ups, and you don't even have to get on the floor to use it! It's so effective, you can see dramatic results in just a few short weeks. The Abflex is so convenient, you can use it anytime, right at home, in a chair or on the floor. You don't even have to change into workout clothes!

Anyone can use the Abflex, whether you've never worked out a day in your life or even if you're a major fitness buff...because the Abflex "resistance bands" adjust perfectly to your individual strength level with 10 resistance settings, ranging from 5 lbs. to 125 lbs.

We recommend consulting your physician before starting any exercise program.

"I look better than I ever [illegible] workout less, and I eat more, all because of the Abflex." Jenny Lee Harrison, co-star of DALLAS and THREE'S COMPANY.






YOUR LIFESTYLE [illegible] which is like 3 great [illegible] that demonstrates your [illegible] aerobics tape. 3. It's a [illegible] page Abflex nutritional [illegible] you more than 90 delicious [illegible]

[illegible] get the Abflex guarantee [illegible] times within 30 days, simply return

EXHIBIT C

RECOMMENDED BY ORTHOPEDIC DOCTORS TO FIRM STOMACH AND IMPROVE LOWER BACK PERFORMANCE!
INCLUDES VIDEO!
ABFLEX™
AS SEEN ON TV
The unique Abflex™ System will provide you with the most complete home abdominal workout available anywhere! With an excellent step-by-step video hosted by actress Jenilee Harrison, you'll perform a routine that gradually works you up to ab-isolating floor crunches. For cardiovascular fitness, there's exciting low-impact aerobics led by aerobics champion Ken Rosenthal. Plus a sensible eating program that provides *plenty* of eating satisfaction. Best of all, Abflex™ *flattens your stomach in just 3 minutes a day* – no matter what your current fitness level!
Includes:
• Abflex™
• Medium and Light Resistance Bands and Accessories
• 270-Page Abflex™ Lifestyle Eating Program Book
• Instructional Video
Measures 29" x 19" x 4"
Slice! Dice! Shred! Grate! Chop!
This hand-held "food processor" does it all!
SUPER SLICER™
8-Piece Set includes:
• Spiral Cutter • V-Knife
• Orange Squeezer • Slicer
• Waffle Cutter • Grater
• Instruction Manual • Safety Holder
There's no counter-top mess or tedious hand-cutting with this nifty multi-grater! A complete food preparation system, the Super Slicer™ has 5 interchangeable stainless steel blades that allow you to *grate, chop, shred, slice and much more* – easily and uniformly. There's even a rotary dial that lets you adjust the thickness of the slice with just a twist of your wrist! Designed with safety in mind, the Super Slicer™ is a must for every kitchen!
Rotary dial lets you adjust thickness with the twist of your wrist!
Safety holder prevents accidents!
Measures 13-7/8" x 2" x 4-7/8" Disassembles for easy cleaning; top rack dishwasher safe.
©Slices, dices, shreds, grates & chops in seconds and more!
4 PAYMENTS EACH ONLY $5.49

chances of winning have never been better. That's why I urge you
mplete and return your last stage entry today. Because there's a
g. d chance you'll win this time ... maybe even $10,000,000.00!

Cordially,
Robert Miller

EXHIBIT C

EXHIBIT D

# GET A FLAT, SEXY STOMACH IN JUST 3 MINUTES A DAY!

## While You Sit In A Chair Or Even Watch TV!

ABFLEX®

**The Fastest, Easiest, Safest Way Ever To Achieve:**

- ☑ A flat, toned stomach
- ☑ A shapelier waistline
- ☑ A healthier back

**HERE'S THE MAGIC OF ABFLEX:**

Only the ABFLEX patented direct resistance design targets all the abdominal muscles simultaneously in one easy exercise to:

- Flatten a bulging tummy
- Eliminate a spare tire • Trim the waistline
- Get rid of those "love handles" at the sides of the waist with its special attachment

Lost 3 inches and 13 pounds in 30 Days!

**DRAMATIC RESULTS IN JUST A FEW WEEKS... AND NO BACK STRAIN!**

Eight out of ten adults have back problems! And the number one cause of back pain is weak abdominal muscles! According to this prominent orthopedic surgeon, ABFLEX can help prevent and in some cases eliminate back problems: *"ABFLEX strengthens your abdominal muscles, but does not put excessive strain on your back muscles – which is a major problem with situps and crunches. ABFLEX isolates and works your abdominal muscles more effectively! It's safer, has the edge over every other product, and it's a lot less expensive!"* – Dr. Lawrence Kurz, M.D.

**YOU CAN SAY GOODBYE TO SITUPS, CRUNCHES, AND LEG LIFTS!**

Just sit in your favorite chair. Place ABFLEX against your tummy. Tighten your stomach muscles as you pull the ABFLEX toward you. Hold for 3 seconds. Then release. Repeat for just 3 minutes a day. It's that easy, and incredibly affordable!

The ABFLEX System includes 3 simple and effective exercise routines that...

JUST LOOK AT THOSE ABS!

Jenilee Harrison, famous TV Star. You saw her on Dallas and Three's Company. Now, here's Jenilee introducing ABFLEX on TV:

*"I hate going to the gym. I hate doing situps. That's why I love this ABFLEX! It's the easier, more effective way to stay in shape. You can do it right at home, sitting in a chair. You don't even have to change into workout clothes!"*

**ALL THIS FOR JUST 3 EASY PAYMENTS OF $19.95**

The Revolutionary New ABFLEX System, plus the 1-hour ABFLEX Lifetime Fitness Instructional Video and the 250 page ABFLEX Nutritional guide which lists over 2,000 low-fat foods and gives you over 90 delicious recipes!

You've probably discovered that other methods just don't work! Situps involve just one set of muscles. Leg lifts don't involve any significant muscle groups at the stomach! The ABFLEX actually zeroes in on the upper, lower and side acts that contour your stomach. That's why ABFLEX can show such remarkable results – in just a few weeks! And there's more.

**OFFERS YOU 13 DIFFERENT RESISTANCE SETTINGS!**

ABFLEX comes in graduated strengths. Start out with the adjustable 10 lb. setting. Then as your stomach muscles get stronger, move up to the 15 lb., 20 lb., 25 lb. and 30 lb. settings.

Martin Van Der Hoeven, ABFLEX inventor, research scientist and former triathlete. He worked for five years to perfect ABFLEX, *"the very first home exercise machine to target all those hard to firm abdominals – upper, lower and side with one easy exercise!"*

By the way, there's only one other machine that's as effective as ABFLEX: that's Mr. Van Der Hoeven's other patented exercise machine, which costs $6,000.00 and can be found only in the finest health clubs!

**ABFLEX NO RISK GUARANTEE**

If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX System for a full refund of your purchase price! You have nothing to lose but your paunch!

See for yourself! ABFLEX is so incredibly easy to use, so effective and so affordable, it even makes conventional exercise and all other equipment obsolete!

**CREDIT CARD CUSTOMERS CALL TOLL FREE**

**1-800-548-7700**

**YES!** Please rush my ABFLEX with a no-risk money-back guarantee!

I'm paying by credit card:

☐ 3 easy payments of $19.95 each plus $7.95 S&H. (4-6 weeks delivery)

☐ SAVE $5.00. 1 payment of only $54.95 each plus $7.95 S&H. Total $62.90 and receive free express handling. (2 weeks delivery)

☐ Special Waistline Attachment to get rid of "love handles" (Side). Only $9.95 plus $2.95 S&H.

☐ Visa ☐ Mastercard ☐ Discover ☐ American Express

Card # _____ Exp. _____

I'm paying by Check or Money Order – *Total Amount Only.* Rush Delivery guaranteed within two weeks.

☐ ABFLEX on 1 payment of only $54.95 plus $7.95 S&H and handling. Total $62.90

Send check ☐ or money order ☐

Make check or money order payable to ABFLEX, plus $6.95 S&H

Mail to: ABFLEX

Dept. AB4702 Box 4011 Denver, CO 80204

# EXHIBIT E

## ABFLEX INFOMERCIAL TRANSCRIPT

[Superscript: Kent & Spiegel]

MALE NARRATOR 1: The following is a paid commercial presentation for the Abflex.

Does your stomach look like this? [Superscript: Does Your Stomach Look Like This?]

In just a few minutes a day, it could look like this. [Superscript: It Could Look Like This.]

[Superscript: If You Start Using This.]

If you start using this. It's the revolutionary new ABFLEX [Superscript: Abflex] and it's so easy to use, so affordable and so incredibly effective it makes all these painful exercises and all this high priced equipment totally obsolete. [Superscript: Obsolete]

So join special guest television star Jennilee Harrison [Superscript: Jennilee Harrison] inventor Martin Van Der Hoeven [Superscript: Martin Van Der Hoeven] and martial arts legend Tiger Yang [Superscript: Tiger Yang] and discover the fast way to a firm stomach, a slim waistline and a healthy back on this special edition of Fitness Challenge. [Superscript: Abflex Fitness Challenge] And now, here's the host of Fitness Challenge Van Allen.

VAN: Thank you. Thank you. You're a great audience. Thank you very much and welcome everybody. Well, we've got a great show for you today because we're going to be taking on a fitness challenge that so many of us are facing. We're talking tummies, gang. How do we firm 'em up and slim 'em down. Sometimes it seems hopeless, right? But today we're going to hear about a new machine called the Abflex. Well, they say it can flatten our stomachs in just a few minutes a day. Plus, the inventor of the Abflex, by the way, this is him right here. Alright, calm down ladies. He's going to issue a challenge to everyone here in our studio audience and everyone watching at

## EXHIBIT E

But joining us first is a wonderful actress, you've seen her on Three's Company, you've seen her on Dallas, everybody please welcome Jennilee Harrison.

Alright Jennilee.

Jennilee: Hi!

Van: Welcome to the show.

Jennilee: Thank you. Very nice to be here.

Van: Now, Jennilee, we know you, of course, as an outstanding actress, but you're also quite an athlete. Now, you're a rodeo champion and I've seen you on the cover of a fitness magazine.

[Cuts to Fit and Shape magazine covers]

Jennilee: Oh, I love to stay in shape. But you know one thing, I hate going to the gym. Who has the time today?

Van: Yeah, who has the time? Sure.

Jennilee: And that's why I love the Abflex. [Subscript: The Abflex program includes a low fat diet and aerobic exercise.] You know today I look better than I ever have and I work out less and I eat more, all because of the Abflex.

Van: Well, you look great by the way.

Jennilee: Thanks. And you know what, I don't have to do an exercise that I despise which is situps. Don't you just hate doing situps? There is no reason to have to do another one . . .

Van: Wow, that's great!

Jennilee: . . . now that there is an easier, more effective way to flatten our stomachs, thanks to Abflex.

Van: Ahh.

Jennilee: The Abflex, it targets your abs much better than situps do and it doesn't strain your back when you do it like sit ups do.

Van: Sure, oh yeah, it's painful.

Jennilee: And you don't have to get on the floor to use it.

Van: You don't even have to get on the floor?

## EXHIBIT E

Jennilee: No, no, no. 'Cause let me show you, this is how the Abflex works. I'm going to take this chair here. I'm going to put my hands right into these handles, put this pad right here on your bellybutton and you pull it in, you do like a crunch, hold it for just a few beats and slowly release it.

Van: Well look at that. That is really easy.

Jennilee: That's it.

Van: That is so easy.

Jennilee: It's called the Abflex crunch. You can do it right at home sitting in a chair like I am, you can do it on the floor whichever you prefer and anyone can do this whether you have never worked out a day in your life or whether your a major fitness buff because the Abflex adjusts to your strength level. [Superscript: 18 Resistance Settings] There's 18 different settings on it and you can go either from 5 to 125 pounds of resistance. [Superscript: 5 to 125 lbs. Resistance]

Van: So a whole range so anybody can do it.

Jennilee: And here's the best thing about Abflex.

Van: Uh huh.

Jennilee: It targets the abs much better than situps do and you only have to use it three minutes a day.

Van: Three minutes, wait a second. Hey there goes my old excuse about not having enough time to exercise.

Jennilee: No excuses.It's called the three minutes flat Abflex workout [Superscript: 3 Minutes Flat Abflex Workout] It's over before you know it. And you'll get a flat stomach even before you know it. You know I used to have this pooch right here.

Van: Oh yeah.

Jennilee: How many of you?

Van: Oh yeah.

Jennilee: No matter how much I worked out or no matter how much I starved myself or dieted I never could get rid of that and after I started [Subscript: Your results may vary.] the Abflex system it went away within, like, two weeks.

## EXHIBIT E

Van: Incredible. That's fantastic.

Jennilee: Oh yeah it's the best. And let's look at the results some of these people got after just a few weeks on the Abflex system.

[Superscript: Lost 13 lbs in 30 days. Subscript: The Abflex program includes a low-fat diet and aerobic exercise.]

Van: Wow

Jennilee: Isn't that incredible.

Van: Wow, look at that. I mean that's amazing.

Jennilee: Yeah.

[Superscript: Lost 6 inches in 30 days. Subscript: Your results may vary.]

Van: Hey you guys, look at the difference.

Jennilee: And it can work for anybody. Just three minutes a day and you can flatten that tummy right up.

Van: That sounds great.

Male
Testim. 1.: You don't even know you are doing, you don't even know you are doing your exercises. And you're doin' it the whole time [Subscript: The Abflex program includes a low-fat diet and aerobic exercise. Your results may vary.] and pretty soon your stomach is like a brick. And you've lose all that weight.

Female
Testim. 2.: The fact that I now have a flat stomach, something that I've never had before. It's just, it's great.

Male
Testim. 3.: After using the Abflex there's no way I'll return to doing crunch machines and inclined situps cause they didn't isolate my abs the way the Abflex program does.

Female
Testim. 4.: I do know that with the Abflex system in two weeks I've seen a difference. That's great.

Female

## EXHIBIT E

Testim. 5.: I saw more results in a week than I did with a month worth of situps.

Male
Testim. 6.: After using the Abflex 30 days [Subscript: The Abflex program includes a low-fat diet and aerobic exercise. Your results may vary.] I lost two inches off my waist and I lost 13 lbs. so I went from a size 36 slacks back to a 34. Perfect.

Van: How does the Abflex produce results so quickly?

Jennilee: Why don't we ask the inventor himself?

Van: What a great idea. Alright, well let's bring him out here. He's a former triathlete and a research scientist, please welcome Martin Van Der Hoeven and the Abflex crew.

Welcome to the show. Now Martin, I know that the Abflex seems to really zero in on those abs, but I've always heard they are the hardest muscle to target.

Martin: Well, you know they really are because we have so many different abdominal groups. You have your uppers, you have your lowers, you have your left side, your right side, but even more difficult, they don't flex the same way as your other muscle do. Here's an example. What joint do you think I am moving here?

Van: The elbow.

Martin: That's right. And Jenni, what muscle?

Jennilee: The bicep.

Martin: That's right. This is what we call a jointad muscle because when this joint moves, this flexes. What about a sit up? Think about this here. Now what joint am I moving here?

Jennilee: The hip joint.

Martin: That's right Jenni. And what muscle?

Van: Well, that's easy, the abs, that's why you do sit ups.

Martin: That's wrong.

Van: Wrong?

## EXHIBIT E

Martin: You're really working the hip joint and you're working the hip flexor muscles. The abdominals are a non-jointed muscle. Let me repeat that: Abdominals are non-jointed muscles. They're not attached to joints. And the only way to work out a non-jointed muscle is by direct resistance like the Abflex right here.

Van: Ah, okay.

Jennilee: You know most people have never even felt their abs until they started using the Abflex.

Van: Is that right? So all these exercises that we do to try to flatten our stomachs, they're really not that effective.

Jennilee: That's right

Martin: Here's a sit up, and we're doing the same thing, we're moving the hip joints, but the abs are non-jointed muscles. So you're not getting that full ab workout. You're not getting much of an ab workout at all.

Jennilee: Worst of all, 90% of the stress goes directly into your lower back.

Van: Oh yeah they're painful to do.

Jennilee: Doctors will tell you, sit ups, they do more harm than good. But here's an exercise that I used to do before I knew better. The leg lift. Again, the leg lift will put tons of pressure on your lower back, it's not good for it at all.

[Cuts to article: "She wants exercises to tighten tummy," from Ask Dr. Lamb, Dr. Lawrence Lamb: column]

And Dr. Lawrence Lamb said in his nationally syndicated column [superscript: . . . Leg lifts don't even involve any significant muscle groups of the abdomen . . . ] that leg lifts don't involve any significant muscle group of the abdomen.

Van: None of them at all?

Jennilee: No.

Van: Gosh.

Martin: Well, you know this is a little better than a sit up, it's an abdominal crunch. You're really working

## EXHIBIT E

just this upper abdominal right here, you're not putting much pressure into the lower abs, side abs or the right side abs.

Jennilee: And for us women who are trying to get rid of that pooch down here and for you guys trying to get rid of the love handles, forget it. This exercise is useless. But, now here, this is the answer. This is the Abflex crunch. now when you put the Abflex on there it suddenly isolates all these muscles. It will incorporate [Superscript: works all major abdominals simultaneously ABFLEX] the upper abs, the lower abs and the side abdominal muscles all in one simple exercise.

Van: So this exercise really turns the crunch into the super crunch.

Jennilee: Exactly. And a scientific study proved it.

Using an electromyograph, a device which measures muscle activity, they first tested an ordinary crunch then they tested the Abflex crunch. Look what happened. The Abflex targeted the abdominal muscles so much better the scores literally went off the chart.

Van: Wow! So what that means is that the Abflex is actually going to flatten my stomach faster right?

Martin: Much faster

Jennilee: That's it.

Martin: I spent 45 minutes and over 500 situps doing my abs workout. And this is what I looked like.

Van: Hey you know that's not so bad Martin.

Martin: But do you know after just a few weeks of using the Abflex for only three minutes a day this is what happened. [Subscript: Your results may vary.]

Van: Now hey there's that washboard look all us guys would love to have.

Jennilee: Well you can have it. Look at this woman. If you'd like to go down a few sizes [Superscript: Lost 6 inches in 30 days. Subscript: Best case results. Your results may vary.] the Abflex system is the fast way to lose those inches.

Female

## EXHIBIT E

Testim. 7.: Having children just really wreaks havoc on your body. Especially, especially your stomach muscles. The Abflex really firmed up my lower abs and that's right where I needed it. [Subscript: The ABFLEX program includes a low fat diet and aerobic exercise.] Well I think in about 21 days I've, I've lost about 2 inches.

Female Testim. 8.: [Subscript: Your results may vary.] After 30 days I lost a full 6 inches. Then I was starting to put on a lot of my clothes that had been sitting way back in the closet and they were fitting. It was so wonderful.

Male Testim. 1: Four and half inches I lost. I was 39 1/2 and went down to 35. Boom, just like that.

Female Testim. 9.: With the Abflex I have lost 5 to 6 inches within 30 days and I have seen the results and so has everybody else. It works great.

Van: Well, I have to admit, I mean the Abflex really does seem to do an incredible job of firming up the abs.

Jennilee: And just [Subscript: Consult your physician before beginning any exercise program.] as important is what the Abflex can do for your stomach, is what it can do for your lower back. I want to show you something. Here, hold this.

Van: Whoa.

Jennilee: How much do you think that that watermelon weighs?

Van: I don't know, 9 or 10 pounds?

Jennilee: Do you know that whatever you carry in front of you puts seven times the amount of stress on your back. You carrying 10 pounds here is putting 70 pounds of pressure of stress on your back.

Martin: Wow.

[Subscript: 8 out of 10 adults have back problems.]

Jennilee: Eight out of ten adults have back problems. It costs America $54 billion a year to take care of their backs and the number one cause of lower back pain is poor abdominal muscles.

## EXHIBIT E

[Superscript: Abflex Strengthens Abdominals]

The Abflex strengthens your abdominals so it can relieve lower back pain. Plus the Abflex [Superscript: ABFLEX No Stress on Lower Back] puts no stress on your lower back.

Martin: That's what great about the Abflex. There's so many machines out there that can hurt you and really put stress on the back.

Jennilee: In fact, Abflex is so back safe I know orthopedic surgeons who prescribe it to their patients.

Male Testim. 10.: The Abflex, while it strengthens your abdominal muscles, does not put excessive strain on the lower back muscles [Superscript: Dr. Lawrence Kurz, M.D., Orthopedic Surgeon] that's a big problem with situps and crunches. So it really isolates the abdominal muscles very well, and that's why it has the edge over other products.

Male Testim. 11.: I'd worn a brace for almost a year and a half [Subscript: Consult your physician before beginning any exercise program.] because my back was in constant pain. And after using that for about six weeks, I stopped using the brace and my back started getting better. As my stomach tightened up, [Subscript: Your results may vary.] I also lost a few inches on my stomach.

Male Testim. 6: I felt that with Abflex after I tried it for the first week I found that my back didn't hurt. Crunches I've done in the past, two days later I can hardly even stand up straight.

Testim. 12.: This Abflex apparatus has [Superscript: Randy Frisch, Health Club Director] in one step eliminated all those other opportunities for injury and thus is the safe and quickest most efficient piece of equipment I've ever seen.

Van: Stay tuned folks, coming up on Fitness Challenge, you'll see an amazing display of abdominal strength. But first, here's your chance [Subscript: This is a paid advertisement for the ABFLEX presented by Kent & Spiegel Direct.] to order the Abflex and firm up your abs in just three minutes a day.

## EXHIBIT E

Announcer: Isn't it amazing what we'll put ourselves through to try to flatten our stomachs? Well, finally there is a better way. Introducing the revolutionary new Abflex [Superscript: ABFLEX] The first home exercise machine that works the upper, lower, and side abdominals with one simple exercise. Thanks to its patented direct resistance design, the Abflex zeros in on those hard to target abdominal muscles so it can give you a firm flat stomach and slim sexy waist, in just three [Superscript: 3 Minutes Flat Abflex Workout] minutes a day. The Abflex assembles in just seconds and has 18 different resistance settings [Superscript: 18 Resistance Settings] as little [Superscript: 5 to 125 lbs Resistance] as five pounds for beginners or as much as 125 pounds for experts. [Superscript: No Stress On Lower Back] The Abflex puts no stress on your lower back and its so [Superscript: Dramatic Results in a Few Weeks] effective you can see dramatic results in just a few short weeks.

Female Testim. 13.: [Superscript: ABFLEX] Within, I would say, the third or fourth day that I started using it I started noticing tightening, firmness and my pants had started loosening up a little. I kept continuing using it and before I knew it I was back to a 5/6 from a 9/10 [Subscript: Your results may vary.] It was very dramatic.

Announcer: When you order your Abflex, you'll also receive this one hour long lifestyle fitness video. It's three fantastic videos in one. It's an instructional tape that demonstrates your three minutes flat Abflex workout. It's a 20 minute aerobics tape. It's even a video housecall from a leading back specialist. Plus, if you order now, you'll also receive the 250 page Abflex nutritional guide which lists [Superscript: Over 2000 Low Fat Foods] over 2000 low fat foods and gives you [Superscript: 90 Healthy Recipes] more than 90 delicious healthy recipes. Why spend hundreds [Superscript: $Hundreds$] even thousands of dollars [Superscript: $Thousands$] for another ab machine when you can have the amazing new abflex [Superscript: ABFLEX] along with the video and nutritional guide for [Superscript: Only three payments of $19.95] only three easy payments of $19.95. and you get the Abflex Guarantee [Superscript: Abflex Guarantee If you don't lose 3 to 6 inches and 10 pounds

EXHIBIT E

within 30 days, simply return the ABFLEX for a full refund.] If you don't lose 3 to 6 inches nd 10 pounds within 30 days, simply return the ABFLEX for a full refund of your purchase price. The Abflex, it's the fast way to a flat stomach, a shapely waistline, and a healthy back. So call now [Superscript: 1-800-736-9992. Only three payments of $19.95 Plus $7.95 U.S. or $11.95 Canada S&H. CA & TX Res. add sales tax. Or Send Check or Money Order To: ABFLEX, Box 6015, Culver City, CA 90233. Subscript: ABFLEX 30 day money back guarantee [less S & H].] Have your credit card ready and call the number on your screen to order your Abflex system right now or send a check or money order for the full amount including Shipping, Handling and applicable tax. Only the patented Abflex provides direct resistance for a flat slim stomach in only three minutes a day. And the Abflex guarantee makes it risk free. Lose 3 to 6 inches and 10 pounds within 30 days or return the Abflex system for a full refund of your purchase price. Now, it's easy to have the abs you've always dreamed of. Call now.

[Superscript: Abflex Fitness Challenge]

Van: Alright, welcome back. I'm with Jennilee Harrison and Martin Van Der Hoeven, the inventor of the Abflex, the home exercise machine that can flatten your stomach in just three minutes a day.

Alright, now we've already seen how the Abflex is more effective than exercises like situps or leg raises or crunches, but how does Abflex compare to other machines?

Jennilee: Well, I used to go to the health clubs and I would use a big machine like this to work my upper abs, then I'd find another big machine to work my side abs, but I never found a machine that could target the lower abs until I discovered the Abflex. You can really feel this working. When you place it over your bellybutton and pull it in, you can feel it working the upper abs, the middle and even this lower section which we women really need, especially if you've had a baby.

Van: Oh sure.

Jennilee: The Abflex has even helped me firm up my arms, see as I'm using it. I don't bother going to the health club anymore. The Abflex is so much more

## EXHIBIT E

convenient. You can use it right at home, sitting in a chair while watching TV. You don't even have to change into workout clothes. I love this.

Van: Okay, okay. But, you know, this is a popular machine that you might have seen on TV. Now, how doe this compare to the Abflex?

Martin: Well, you know, Van and Jenni, this is a good machine, but it doesn't have direct resistance. And what we've said is without direct resistance for the abs, you can't work all the muscles simultaneously in one exercise. Also, this sit-up motion puts stress on your lower back; the Abflex puts no stress on your lower back.

Jennilee: Plus, this machine -- it takes longer to use, it takes up a lot more space, and it costs three times the amount that the Abflex does.

Van: Okay. But, now, this is more in the Abflex's price range. Now, I've seen this piece of ab equipment advertised on TV. Now what, exactly, does this do?

Jennilee: That's a good question. [Laughter] In a recent issue of a leading fitness magazine, they reviewed this piece of equipment and said it does not enhance the benefit of an abdominal crunch. [Superscript: Cut to excerpt from magazine: "this device does not enhance the benefit of an abdominal crunch] But the Abflex sure does. Here, Van, give it a try.

Van: Well, sure.

Jennilee: Martin . . .

Martin: Let me get over here, okay? Come on down over here.

Van: Okay.

Martin: And, you're going to have an incredible ab workout. Put it right on your belly button.

Van: Alright

Martin: You're going to pull it down and do a crunch. Do that crunch. There you go.

Van: Wow!

Martin: Bring it back --

Van: You know, I can really feel it working the upper and lower abs.

## EXHIBIT E

Martin: You're going to feel it simultaneously in the sides, with your arms there . . .

Van: Yeah, I feel it on the sides, too.

Martin: and right on the lower abs.

Van: Boy, wait 'til you try this, gang. This really does turn a crunch into a super crunch.

Jennilee: See, you can feel the Abflex working right away. In fact, we went to a local mall and asked people to try the Abflex for the very first time. Here's what happened.

Jennilee: Pull this down, towards your stomach. Lift up. Hold for a two count, then release it. Go back slowly. How does that feel compared to a regular sit-up?

[Superscript: ABFLEX]

Male Testim. 1: I can feel it a lot.

Jennilee: A lot.

Male Testim. 1: Feels good. Because it centers on the stomach -- on the stomach muscles, where it counts the most.

Female Testim. 2: I have a back problem, so I really can't do sit-ups. So this is great.

Jennilee: And this puts absolutely no strain on your back?

Female Testim. 2: No strain at all.

Jennilee: And what if I told you you only had to do it three minutes? Five times a week?

Female Testim. 3: I love it, I love it, 'cause I have a little baby and I can't take the time out.

Male Testim. 4: Oh, I feel the tension in the stomach. It feels good.

Male

## EXHIBIT E

| | |
|---|---|
| Testim. 5: | Yeah, I use the gym machines. They don't work at all compared to this. It works really good. |
| Female Testim. 6: | Thirty minutes? Oh, three minutes? Ohhhh. . . Wow. |
| Male Testim. 7: | Oh, yeah. I feel it right there. |
| Male Testim. 8: | Three count, right? |
| Jennilee: | Sure. |
| Male Testim. 7: | Oh, yes. One, two, three . . . Oh, I like that one. You can feel it -- it feels great. |
| Female Testim. 9: | Three minutes a day? Yeah, that is really good. |
| Male Testim. 10: | I can tell that that would firm it up. And in the shorter time -- that's a benefit, definitely. |
| Female Testim. 11: | I feel its working. But it doesn't kill me. |
| Female Testim. 12: | I like this. I'd do this every day. |
| Female Testim. 13: | I can feel it in my stomach right here. It feels like its working. |
| Female Testim. 14: | Ohh. Pressure. Pulling your muscles, yeah. That's great. That's a great thing. |
| Female Testim. 15: | I'm going to take this one. My hands are stuck to this now. |
| Female Testim. 2: | Am I going to get to keep this one? |
| Male Testim. 1: | I like it a lot. I'm going to have to buy me one of these. |

# EXHIBIT E

Van: Now, a minute ago we saw why the Abflex is so much better than other ab equipment, but let's take a look at a machine that can give the Abflex a run for its money.

Jennilee: And guess who invented it.

Van: Uh huh. [Laughter]

Martin: This is my Realflex machine. We introduced it about five years ago, and it was the first ab machine as you could see that had direct resistance.

Jennilee: The Realflex is a great health club machine. But, its too big for home use, and it costs $6,000.

Van: Six thousand . . .

Jennilee: So Martin decided to make a smaller version of this that everyone could afford.

Martin: Well, we spent five years and over a million dollars in creating the home version of the Realflex machine. [Superscript: ABFLEX] And what we ended up with is the Abflex.

Van: Ah. Okay. But tell me, does this work as well as this?

Jennilee: It works even better.

Van: Better than the $6,000 machine?

Martin: I'm convinced the Abflex works the abs better than any machine that's ever existed.

## EXHIBIT E

Male
Testim. 16: I saw results in the first five to seven days. I could see visual results of the Abflex program. [Subscript: Your results may vary] I lost about an inch to an inch-and-a-half in the waist and also lost five pounds. It just doesn't make sense to buy a different ab machine, other than Abflex.

Female
Testim. 17: I definitely have a lot more confidence now, due to using the Abflex machine. I'm not afraid to wear half tops anymore. I don't need to feel I need to cover up my stomach anymore, 'cause its a lot more defined and all my friends are noticing it. Its great.

Female
Testim. 18: Seven months ago I had a baby, and while I was pregnant I went up to 150 pounds. My stomach was out to here. Since using the Abflex, I actually have my waist back to what it was before. I saw more results in a week than I did with a month's worth of sit-ups.

Van: Now, what's going on here? Jennilee has a dozen people up from our audience doin' all kinds of crazy exercises. What are you up to?

Jennilee: Van, a leading fitness magazine said that these are the twelve exercises you should be doing to get yourself a complete ab workout.

Van: Twelve exercises. You mean, I'm supposed to do all these exercises if I want to flatten my stomach?

Jennilee: Well, you have a choice. You can either spend an hour doing all these exercises, or you can spend three minutes doing exercises with the Abflex.

Van: You know, that's a pretty easy choice. I think I'll use the Abflex.

## EXHIBIT E

Jennilee: Well, the Abflex is the smart choice. Remember, it puts no stress on your lower back [Superscript: No Stress on Lower Back] so it won't hurt you like some of these other exercises will or those machines can. Its a safe, [Subscript: Consult your physician before starting any exercise program] effective way to firm those abs and flatten those tummies.

[Music starts.]

Male Testim. 19: Its amazing that in our world now of high technology where everything is usually more expensive and bigger, [Superscript: Dr. Lawrence Kurz, M.D., Orthopedic Surgeon] that you have a simple consumer product like Abflex which works your abdominal muscles more efficiently. Its a safer product and a lot less expensive.

Male Testim. 20: The Abflex takes a lot less time and gets a lot more accomplished than sit-ups. I like the Abflex a lot. It has really done what I wanted to do, which is reduce the size of my waist.

Male Testim. 21: I've tried sit-ups in the pool, I've tried sit-ups under the bed -- you name it, I've done it. And I just couldn't seem to get any kind of results out of it. After picking the Abflex up, within the first couple of seconds, I noticed -- I was feelin' somethin' here. You could feel the muscles tightenin' up. It was fabulous.

Female Testim. 22: You could feel 'em.

Male Testim. 23: I'm excited about it. What more can I tell you? I mean, this thing is really workin'. I'm proud of it.

Van: Stay tuned. When we come back, you'll meet legendary Tai Kwan Do champion, Tiger Yang. And, you'll find out just how strong your abs can become if you use the Abflex. [Subscript: This is a paid advertisement for the ABFLEX presented by Kent & Spiegel Direct.]

Announcer: Isn't it amazing what we'll put ourselves through to try to flatten our stomachs? Well, finally there's a better way. Introducing the

EXHIBIT E

revolutionary new Abflex [Superscript: ABFLEX] -- the first home exercise machine that works the upper, lower and side abdominals with one simple exercise. Thanks to its patented direct resistance design, the Abflex zeros in on those hard-to-target abdominal muscles. So it can give you a firm, flat stomach. And a slim, sexy waistline [Superscript: 3 Minutes Flat Abflex Workout] in just three minutes a day. The Abflex assembles in just seconds, and has 18 different resistance settings [Superscript: 18 Different Settings] -- as little as 5 pounds [Superscript: 5 to 125 lbs. Resistance] for beginners or as much as 125 pounds for experts. [Superscript: No Stress on Back] The Abflex puts no stress on your lower back [Superscript: Dramatic Results in a Few Weeks] and its so effective you can see dramatic results in just a few short weeks.

[Superscript: Abflex Subscript: Your results may vary]

Male Testim. 24: After using the Abflex for 30 days, I lost two inches off my waist and I lost 13 pounds. So I went from a size 36 slacks back to a 34. Perfect.

Female Testim. 25: The Abflex is a great investment. Money wise, I would much rather buy this Abflex than any other machine that anybody could show me.

Female Testim. 26: I'm wearing a size four and I've never felt better and I've never been in as good a shape as I am today. And I thank Abflex for it.

Announcer: When you order your Abflex, you'll also receive this one-hour-long lifestyle fitness video. Its three fantastic videos in one. Its an instructional tape that demonstrates your three minutes flat Abflex workout. Its a 20-minute aerobics tape. Its even a video house call from a leading back specialist. Plus, if you order now, you'll also receive the 250-page Abflex nutritional guide, [Superscript: Over 2000 Low Fat Foods] which lists over 2,000 low fat foods and gives you [Superscript: 90 Healthy Recipes] more than 90 delicious, healthy recipes. Why spend hundreds, [Superscript: $Hundreds$] even thousands [Superscript: $thousands$] of dollars for

EXHIBIT E

another ab machine when you can have the amazing new Abflex, [Superscript: ABFLEX] along with the video and nutritional guide for only three easy payments of $19.95. [Superscript: Only Three Payments of $19.95] And you get the Abflex guarantee. [Superscript: If you don't lose three to six inches and 10 pounds within 30 days, simply return the Abflex for a full refund of your purchase price.]

If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX for a full refund of your purchase price. The Abflex, it's the fast way to a flat stomach, a shapely waistline, and a healthy back. So call now

[Superscript: 1-800-736-9992. Only three payments of $19.95 Plus $7.95 U.S. or $11.95 Canada S&H. CA & TX Res. add sales tax. Or Send Check or Money Order To: ABFLEX, Box 6015, Culver City, CA 90233. Subscript: ABFLEX 30 day money back guarantee [less S & H].] Have your credit card ready and call the number on your screen to order your Abflex system right now. Or send a check or money order for the full amount, including shipping, handling and applicable tax. Only the patented Abflex provides direct resistance for a flat, slim stomach in only three minutes a day. And the Abflex guarantee makes it risk free. Lose three to six inches and 10 pounds within 30 days or return the Abflex system for a full refund of your purchase price. Now, its easy to have the abs you've always dreamed of. Call now.

[Superscript: Abflex Fitness Challenge]

Van: All right, we're back. And we're talking about the Abflex -- the machine that makes it easy to flatten our stomachs and firm up our abs. And speaking of firm abs, here's a man who really needs 'em. Please welcome Grand Master, Tiger Yang. [Superscript: Tiger Yang]

Van: Tiger's a three-time heavyweight Tai Kwan Do champion, and a 10th Degree Black Belt. In fact, he's appeared in over 30 Kung Fu movies. He's even been the martial arts instructor for the C.I.A. Tiger, you've used the Abflex. Well, what do you think?

Tiger: I think Martin found secret. Abflex is best way to get strong stomach.

Van: That's coming from a man who knows about abdominal muscles, folks. In fact, he's about to show us just how strong his are. Tiger's assistants are going to

## EXHIBIT E

attempt to break three cinderblocks over his stomach. All right. Are you ready, Tiger?

Tiger: I'm ready.

Van: Okay, here goes.

Jennilee: Wait a second. I've got an idea. Why doesn't Martin do this?

Van: Martin -- why Martin?

Jennilee: Martin's been using the Abflex longer than anybody, so his abs should be just as strong as Tiger's.

Martin: Okay. I'll do it.

Tiger: Well, anyway, Martin -- I'm not guarantee you.

Martin: Abflex will guarantee it. Let's try.

Van: Now, folks -- don't try this at home.

[Drumroll]

Tiger: Are you ready, Martin? [Yells loudly and crushes three cinderblocks with a sledgehammer.]

[Music starts]

Tiger: Incredible!

Van: What an amazing display of abdominal strength. You're okay, right?

Jennilee: Are you okay?

Martin: I'm fine.

Van: Let's take a look at that one more time in slow motion. [Superscript: Instant Replay] Whoa! That is incredible.

Van: Well, now you've really convinced me. [Superscript: 1-800-736-9992] The Abflex definitely works.

Jennilee: And it can work for anyone. [Superscript: Lost 12 Inches; Subscript: The Abflex program includes a low fat diet and aerobic exercise.] Think about how great you're going to feel when you start using the Abflex [Superscript: Lost 13 Lbs. in 30 Days; Subscript: The Abflex program includes a low fat diet and aerobic exercise.] and you start losing those inches. [Superscript: Lost 6 Inches in 30

EXHIBIT E

Days; Subscript: Best case results. your results may vary] Think about how great you're going to feel when you look terrific in your jeans again. Anybody can have a great body; [Superscript: Last Chance to Order 1-800-736-9992 by Internet at http:// tvshopping.com] he Abflex makes it easy.

Martin: And I guarantee results. If you don't lose three to six inches and 10 pounds within 30 days, you can return the Abflex for a full refund.

Jennilee: It only take three minutes a day to flatten your tummy. So what are you waiting for? Order your Abflex now.

Van: We can all spare three minutes to get rid of our spare tires, and we can all afford the Abflex, too. It can flatten our stomachs, it can slim our waistlines, its good for our backs -- hey, this is a great machine. Hey, everybody, come on down and try the Abflex.

Announcer: [Superscript: 1-800-736-9992. Only three payments of $19.95 Plus $7.95 U.S. or $11.95 Canada S&H. CA & TX Res. add sales tax. Or Send Check or Money Order To: ABFLEX, Box 6015, Culver City, CA 90233. Subscript: ABFLEX 30 day money back guarantee [less S & H].] Have your credit card ready and call the number on your screen to order your Abflex system right now. Or send a check or money order for the full amount, including shipping, handling and applicable tax. Only the patented Abflex provides direct resistance for a flat, slim stomach in only three minutes a day. And the Abflex guarantee makes it risk free. Lose three to six inches and 10 pounds within 30 days or return the Abflex system for a full refund of your purchase price. Now, its easy to have the abs you've always dreamed of. Call now.

[Superscript: Produced by Mayhew Breen]

Announcer: The preceding was a paid commercial presentation for the Abflex brought to you by Kent and Spiegel Direct. [Superscript: Kent & Spiegel 6133 Bristol Parkway, Suite 150, Culver City, CA 90230]

Announcer: [Intro repeats]

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment received, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1.a. Proposed respondent Kent & Spiegel Direct, Inc. is a Delaware corporation with its principal office or place of business at 6133 Bristol Parkway #150, Culver City, California.

1.b. Proposed respondent Marsha Kent is an officer of the corporate respondent. Individually or in concert with others, she formulates, directs or controls the policies, acts, or practices of the corporation. Her principal office or place of business is the same as that of Kent & Spiegel Direct, Inc.

1.c. Proposed respondent Peter Spiegel is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs or controls the policies, acts, or practices of the

corporation. His principal office or place of business is the same as that of Kent & Spiegel Direct, Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. *"Weight-loss product"* shall mean any product or program designed to produce weight loss, reduction or elimination of fat, or caloric deficit or to suppress the appetite in a user of the product or program.

3. Unless otherwise specified, *"respondents"* shall mean Kent & Spiegel Direct, Inc., a corporation, its successors and assigns and its officers; Marsha Kent and Peter Spiegel, individually and as officers of the corporation; and each of the above's agents, representatives and employees.

4. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

### I.

*It is ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the "Abflex," any other exercise equipment, or any other weight-loss product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. About the number of pounds users can lose;

B. About the rate or speed at which users lose weight;

C. About the length of time users must use such product to achieve weight loss;

D. That such product causes fast and significant weight loss;

E. That such product causes a reduction in the size or shape of specific, desired areas of the body;

F. That such product causes a reduction in users' body size or shape, or body measurements; or

G. About the benefits, efficacy, or performance of such product in promoting weight loss, unless, at the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the "Abflex," any other exercise equipment, or any other weight-loss product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

III.

*It is further ordered*, That respondent Kent & Spiegel Direct, Inc., and its successors and assigns, and respondents Marsha Kent and Peter Spiegel shall, for five (5) years after the last date of

dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

*It is further ordered*, That respondent Kent & Spiegel Direct, Inc., and its successors and assigns, and respondents Marsha Kent and Peter Spiegel shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, provided, however, that the duty to deliver a copy of this order to future personnel as required by this Part shall terminate three (3) years after the date upon which this order becomes final. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

*It is further ordered*, That respondent Kent & Spiegel Direct, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address.

Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

*It is further ordered*, That respondents Marsha Kent and Peter Spiegel, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of her or his current business or employment, or of her or his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and her or his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VII.

*It is further ordered*, That respondent Kent & Spiegel Direct, Inc., and its successors and assigns, and respondents Marsha Kent and Peter Spiegel shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on September 18, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

# ABFLEX, U.S.A., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3771. Complaint, Sept. 18, 1997--Decision, Sept. 18, 1997*

This consent order requires, among other things, the California-based advertiser and distributor, of Abflex abdominal exerciser, and its officer to have competent and reliable evidence for future claims regarding weight loss and the benefits, efficacy or performance of such a product in promoting weight loss. In addition, the consent order requires that the testimonials in the respondents' advertisement and infomercial either represent the typical experience of users, or include disclosures of the generally expected results or that users should not expect similar results.

## *Appearances*

For the Commission: *Kerry O'Brien* and *Jeffrey Klurfeld.*

For the respondents: *Alexander F. Wiles* and *Stephanie Kaufman Hernand, Irell & Manella,* Los Angeles, CA.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Abflex, U.S.A., Inc., a corporation, and Martin Van Der Hoeven, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Abflex, U.S.A., Inc. is a California corporation with its principal office or place of business at 5962 La Place Court, Suite 260, Carlsbad, California.

2. Respondent Martin Van Der Hoeven is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Abflex, U.S.A., Inc.

3. Respondents have advertised, labeled, offered for sale, sold, and distributed weight-loss and body-shaping products to the public, including the "Abflex," an abdominal exercise device.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated or have caused to be disseminated advertisements for the Abflex, including but not necessarily limited to the attached Exhibits A through E. These advertisements contain the following statements:

A. ["The Abflex Home" page (Exhibit A2)]
"Welcome to ABFLEX YOU ARE SECONDS AWAY FROM THE ABS YOU'VE ALWAYS WANTED
WHAT CAN ABFLEX DO FOR YOU?
SEE WHY ABFLEX IS THE BEST MACHINE FOR ABS
WHO USES ABFLEX?
DON'T BELIEVE US? WATCH THIS! ...."
["What can Abflex do for you?" page (Exhibits A3-A4)]
"If you spend 3 minutes a day with the ABFLEX, you will have firm, tight abs. We guarantee it.
The ABFLEX Guarantee:
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund.
HERE'S HOW:
ABFLEX uses four basic exercises to guarantee you the maximum results: ...."
["See why Abflex is the best machine for abs" page (Exhibits A5-A7)]
"Q&A
How do I know ABFLEX really works?
The ABFLEX Guarantee!!!
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund. ...."
["Who uses Abflex" page (Exhibit A8)]
"Who uses ABFLEX?
The question is: who DOESN'T use ABFLEX to achieve tighter firmer abs?
Join an all-star line-up of celebrities, professional athletes, fitness experts and hundreds of thousands of people across the country and discover the fast, safe way to a firm stomach, a slim waistline and a healthy back.... Besides celebrity users, there are hundreds of thousands of people -- people like you and me -- who simply want the sexiest and flattest abs possible with only 3 minutes a day of exercise. Just look at what people like you are saying about ABFLEX:
....
The ABFLEX Guarantee:
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund"
["Just look at what people like you are saying about Abflex" page (Exhibit A9)]
"ABFLEX WORKS!!
If you don't lose 5 inches and 10 pounds within 30 days, you can return ABFLEX for a full refund."
Consumer endorser: "I Lost 12 inches"
Consumer endorser: "I Lost 6 inches in 30 Day [sic]"

[The advertisement depicts before-and-after photographs of the two consumers.]
["Don't believe us? Watch this!" page (Exhibit A10)]
"....
The ABFLEX Guarantee:
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund." (Exhibit A: Internet Advertisement).

B. "FLATTEN YOUR STOMACH IN JUST 3 MINUTES A DAY!*
ABFLEX...The Fast, Easy Way to a Flat Stomach, Shapely Waistline, and a Healthy Back.
* 4 days a week if you follow the workout program."
Celebrity endorser: "I look better than I ever have! I workout less, and I eat more, all because of the Abflex."
"Home Exercise Machine That Works The Upper, Lower, & Side Abdominals With 1 SIMPLE EXERCISE!
Flatten your abs with the Abflex. Because the abdominals are non-jointed muscles, direct resistance is the way to work-out these non-jointed muscles. Abflex's patented direct resistance design zeros right in on those hard to target abdominal muscles. The result: You can have a firm flat stomach, and a slim waistline in just 3 minutes a day, 4 days a week!

....
The Abflex targets the abs much better than sit-ups; it doesn't strain your back like sit-ups, and you don't even have to get on the floor to use it! It's so effective, you can see dramatic results in just a few short weeks....
INCLUDED: A 1-hour LIFESTYLE FITNESS VIDEO which is like 3 great videos in 1:
1. It's an instructional tape that demonstrates your "3 minutes flat" Abflex workout. 2. It's a 20-minutes aerobics tape. 3. It's a guide to safe-back exercise.
Plus, you'll receive a 250-page Abflex nutritional guide, which lists over 2000 low-fat foods, and gives you more than 90 delicious, healthy recipes.
And most importantly, you get the Abflex guarantee: If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the Abflex for a full refund." (Exhibit B).

C. "RECOMMENDED BY ORTHOPEDIC DOCTORS TO FIRM STOMACH AND IMPROVE LOWER BACK PERFORMANCE!
ABFLEX™
The unique Abflex™ System will provide you with the most complete abdominal workout available anywhere! With an excellent step-by-step video ..., you'll perform a routine that gradually works up to ab-isolating floor crunches. For cardiovascular fitness, there's exciting low-impact aerobics .... Plus a sensible eating program that provides plenty of eating satisfaction. Best of all, Abflex™ flattens your stomach in just 3 minutes a day - no matter what your current fitness level!"
Includes:
* Abflex™
* Medium and Light Resistance Bands and Accessories
* 270-Page Abflex™ Lifestyle Eating Program Book
* Instructional Video" (Exhibit C).

D. "GET A FLAT, SEXY STOMACH IN JUST 3 MINUTES A DAY!
While You Sit In A Chair or Even Watch TV!
ABFLEX®
The Fastest, Easiest,

Safest Way Ever
To Achieve:
A flat, toned stomach
A shapelier waistline
A healthier back
HERE'S THE MAGIC OF ABFLEX:
Only the ABFLEX patented direct resistance design targets all the abdominal muscles simultaneously in one easy exercise to:
* Flatten a bulging tummy
* Eliminate a spare tire * Trim the waistline
* Get rid of those "love handles" at the sides of the waist with its special attachment"
Consumer endorser: "Lost 3 inches and 13 pounds in 30 Days!"
[The advertisement depicts before-and-after photographs of a consumer.]
"DRAMATIC RESULTS IN JUST A FEW WEEKS... AND NO BACK STRAIN!
....
ALL THIS FOR JUST 3 EASY PAYMENTS OF $19.95
The Revolutionary New ABFLEX System, plus the 1-hour ABFLEX Lifetime Fitness Instructional Video and the 250 page ABFLEX Nutritional guide which lists over 2,000 low-fat foods and gives you over 90 delicious recipes!
....
ABFLEX NO RISK GUARANTEE
If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX System for a full refund of your purchase price! You have nothing to lose but your paunch!"
The advertisement contains a statement at the bottom, left-hand corner, in approximately 4-point type: "The ABFLEX System includes a low-fat diet and aerobic exercise. The results may vary." (Exhibit D).

E. "Male Narrator 1: Does your stomach look like this?
[The advertisement depicts stomachs of three obese individuals. Superscript: "Does Your Stomach Look Like This?]
In just a few minutes a day, it could look like this.
[The advertisement depicts three individuals with flat stomachs and slim waistlines. Superscript: "It Could Look Like This."]
[Superscript: "If You Start Using This."]
If you start using this. It's the revolutionary ABFLEX ...
[Superscript: "Abflex"]
... and it's so easy to use....
[The advertisement depicts before and after photographs of a consumer. Superscript: "Your results may vary"]
....
Van Allen: We're talking tummies, gang. How do we firm 'em up and slim 'em down. Sometimes it seems hopeless, right? But today we're going to hear about a new machine called the Abflex. Well, they say it can flatten our stomachs in just a few minutes a day....
Jennilee Harrison: And let's look at the results some of these people got after just a few weeks on the Abflex System.
[The advertisement depicts before-and-after photographs of a consumer. Superscript: "Lost 13 lbs in 30 days. The Abflex program includes a low-fat diet and aerobic exercise."]

....
[The advertisement depicts before-and-after photographs of a consumer. Superscript: "Lost 6 inches in 30 days. Your results may vary."]
Van Allen: Hey you guys, look at the difference.
Jennilee Harrison: And it can work for anybody. Just three minutes a day and you can flatten that tummy right up.
Van Allen: That sounds great."
Consumer endorser: "You don't even know you are doing, you don't even know you are doing your exercises. And you're doin' it the whole time and pretty soon your stomach is like a brick. And you've lost all that weight."
[Superscript: "The Abflex program includes a low-fat diet and aerobic exercise. Your results may vary."]

....
Consumer endorser: "After using the Abflex 30 days I lost two inches off my waist and I lost 13 lbs. so I went from a size 36 slacks back to a 34. Perfect."
[Superscript: "The Abflex program includes a low-fat diet and aerobic exercise. Your results may vary."]

"Jennilee Harrison: And for us women who are trying to get rid of that pooch down here and for you guys trying to get rid of the love handles, forget it. This exercise [abdominal crunch] is useless. But, now here, this is the answer. This is the Abflex crunch ....
Jennilee Harrison: Well you can have it. Look at this woman. If you'd like to go down a few sizes, the Abflex System is the fast way to lose those inches."
[The advertisement depicts before-and-after photographs of a consumer. Superscript: "Lost 6 inches in 30 days. Best case results. Your results may vary."]
Consumer endorser: ".... Well I think in about 21 days I've, I've lost about 2 inches."
[Superscript: "The ABFLEX program includes a low fat diet and aerobic exercise."]
Consumer endorser: "After 30 days I lost a full 6 inches...."
[Superscript: "Your results may vary"]
Consumer endorser: "Four and half inches I lost. I was 39 ½ and went down to 35. Boom, just like that."
Consumer endorser: "With the Abflex I have lost 5 to 6 inches within 30 days and I have seen the results and so has everybody else. It works great."

"Announcer: ... it's so effective you can see dramatic results in just a few weeks."
[The advertisement depicts a woman demonstrating how many inches she has lost around her waist by wearing jeans, which now are too large for her around the waist. Superscript: "Dramatic Results in a Few Weeks"]
Consumer endorser: "Within, I would say, the third or fourth day that I started using it I started noticing tightening, firmness and my pants had started loosening up a little. I kept continuing using it and before I knew it I was back to a 5/6 from a 9/10. It was very dramatic."
[Superscript: "Your results may vary."]
"Announcer: ... you get the Abflex Guarantee. If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX for a full refund of your purchase price. The Abflex, it's the fast way to a flat stomach, a shapely waistline, and a healthy back."

[The advertisement depicts a woman demonstrating how many inches she has lost around her waist by wearing jeans, which now are too large for her around the waist. Superscript: "Abflex GUARANTEE If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX for a full refund."]

....

Consumer endorser: "I saw results in the first five to seven days. I could see visual results of the Abflex program. I lost about an inch to an inch-and-a-half in the waist and also lost five pounds...."
[Superscript: "Your results may vary"]

....

Van Allen: ... The Abflex definitely works.
Jennilee Harrison: And it can work for anyone.
[The advertisement depicts before and after photographs of a consumer. Superscript: "Lost 12 Inches. The Abflex program includes a low-fat diet and aerobic exercise."]
Jennilee Harrison: Think about how great you're going to feel when you start using the Abflex...
[The advertisement depicts before and after photographs of a consumer. Superscript: "Lost 13 lbs in 30 days. The Abflex program includes a low-fat diet and aerobic exercise."]
Jennilee Harrison: ...and you start losing those inches.
[The advertisement depicts before and after photographs of a consumer. Superscript: "Lost 6 inches in 30 days. Best case results. Your results may vary."]
Jennilee Harrison: Think about how great you're going to feel when you look terrific in your jeans again. Anybody can have a great body; the Abflex makes it easy.
Martin Van Der Hoeven: And I guarantee results. If you don't lose three to six inches and 10 pounds within 30 days, you can return the Abflex for a full refund.
Jennilee Harrison: It only takes three minutes a day to flatten your tummy....
Van Allen: We can all spare three minutes to get rid of our spare tires, ...It can flatten our stomachs, it can slim our waistlines,..."(Exhibit E).

6. Through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. The Abflex causes fast and significant weight loss.

B. Consumers lose at least ten pounds and five inches, or three to six inches, off their waistline within thirty days by using the Abflex for just three minutes a day.

C. The Abflex causes weight loss and fat reduction in specific, desired areas of the body.

D. Testimonials from consumers appearing in the advertisements for the Abflex reflect the typical or ordinary experience of members of the public who use the product.

7. Through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and

relied upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

Shopping Stores

http://www.tvshopping.com

# Directory

**Choose Store Below**

□ If you would like more information on how to be a merchant, please e-mail Webmaster@tvshopping.com

EXHIBIT A

Abflex Home Page http://tvshopping.com/abflex

# *Welcome to ABFLEX*

## YOU ARE SECONDS AWAY FROM

### THE ABS YOU'VE ALWAYS WANTED

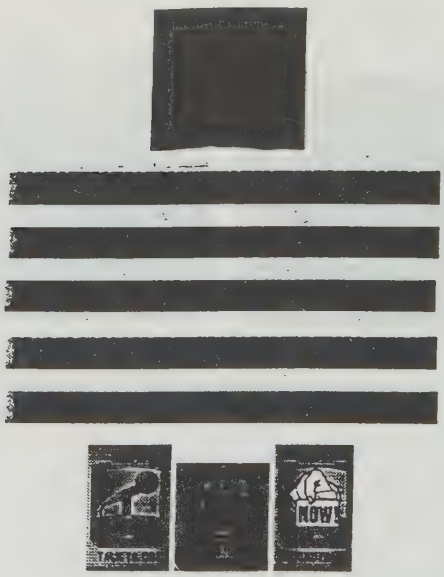
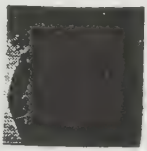



EXHIBIT A-2

EXHIBIT A



**If you spend 3 minutes a day with the ABFLEX, you will have firm, tight abs.**



# *We guarantee* it.

**The ABFLEX Guarantee :**
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund.

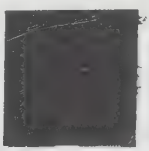
---

## HERE'S HOW:

ABFLEX uses four basic exercises to guarantee you the maximum results:

*I.* The Tummy Crunch tightens your stomach and slims your waist.

*II.* Advanced Pull-In offers you a progressive resistance which, combined with the floor crunch position, blasts you to the firmest possible abs.



*III.* The side crunch slims and strengthens the side and oblique abs.

## EXHIBIT A

3 Minutes a Day http://tvshopping.com/abflex/page1.html

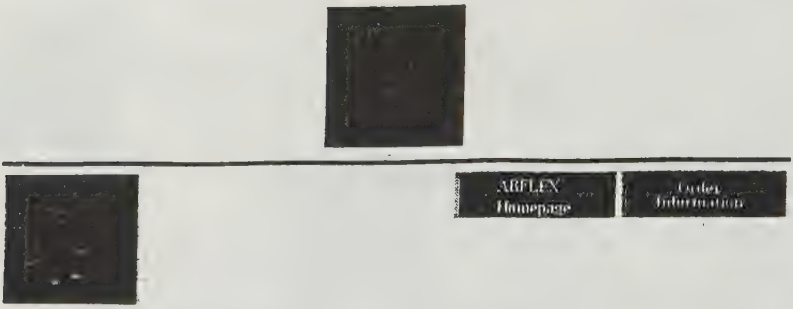



EXHIBIT A-4

EXHIBIT A

http://tvshopping.com/abflex/page2.html

ABFLEX Homepage

Order Information

EXHIBIT A-5

EXHIBIT A

## Q & A

How do I know ABFLEX really works? ⇓

The ABFLEX Guarantee!!!
If you don't lose 5 inches and 10 pounds within 30 days, you can return the ABFLEX for a full refund.

Who needs ABFLEX? ⇓

Any one who wants a sexy, flatter stomach in just 3 minutes a day. Who doesn't want to look sexier with a better physique?

How does it compare to other equipment? ⇓

If you can prove another fitness product can target the abs better than ABFLEX you will receive a $100,000 from ABFLEX.

How does ABFLEX work? ⇓

Other than the heart, the abs are the only muscles in your body that aren't connected to any joints. That's why they're almost impossible to target.
The only way to target them is with direct resistance.
Most people have never really worked their abs in their entire life until they've used the ABFLEX.

What about sit-ups and crunches? ⇓

With sit-ups, you're bending the hip joint so you're working the hip flexor muscles, but you're hardly working the abs at all. Worst of all, 90% of the stress goes right to your lower back. Doctors will tell you sit ups do more harm than good.
And crunches only work the upper abs - not the lower abs or the sides. Therefore, to flatten the bulge or the love handles, it is useless to do crunches.

What is the ABFLEX made of? How much does it weigh? ⇓

ABFLEX is made of sturdy plastic and weighs approximately 5 pounds.

## EXHIBIT A

Is ABFLEX built to last? ⇓

ABFLEX is guaranteed for one year on parts...but it is built so tough it should last well past 5 years!

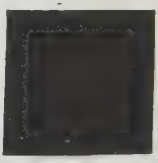
Will ABFLEX work my arms? ⇓

ABFLEX is a terrific all around upper body workout. In addition to giving you rock hard abs, ABFLEX will help tone your biceps, lats and pectoral muscles.

EXHIBIT A

Who uses ABFLEX http://tvshopping.com/abflex/page4.html

# Who uses ABFLEX?



The question is: Who ***DOESN'T*** use ***ABFLEX*** to achieve tighter firmer abs?

Join an all-star line-up of celebrities, professional athletes, fitness experts and hundreds of thousands of people across the country and discover the fast, safe way to a firm stomach, a slim waistline and a healthy back. ***ABFLEX*** is used by thousands every day to give them a real advantage in their exercise program.

You may have seen our recent nationally aired TV show showing the benefits of ***ABFLEX***. The show is hosted by two devoted users of ***ABFLEX***: Television star Jennilee Harrison (the costar of Dallas and Three's Company) and Martin Van Der Hoeven, the inventor of ***ABFLEX***.

In fact, Jennilee believes in the results she has gotten so much she has become the spokesperson for the company.

Martin van Der Hoeven the inventor of ***ABFLEX*** developed his drum tight abdomen in only two months using the ABFLEX System.

Besides celebrity users, there are hundreds of thousands of people-- people like you and me -- who simply want the sexiest and flattest abs possible with only 3 minutes a day of exercise. Just look at what people like you are saying about ***ABFLEX***.

To get abs in 3 minutes that you can only usually get in 45 minutes, order your own ***ABFLEX*** today. (radio button that clicks the user to the order page)

## The *ABFLEX* Guarantee :

If you don't lose 5 inches and 10 pounds within 30 days, you can return the ***ABFLEX*** for a full refund

ABFLEX Homepage

Order Information

EXHIBIT A-3

EXHIBIT A

ABFLEX Works!! http://tvshopping.com/abflex/people.html

# *ABFLEX WORKS!!*

**If you don't lose 5 inches and 10 pounds within 30 days, you can return ABFLEX for a full refund.**

**"I Lost 12 inches "**

## See What and Hear What People Are Saying About the ABFLEX!!

**Customer 1—Qtime, Avi**
**Customer 2—Qtime, Avi**
**Customer 3—Qtime, Avi**

---

**"I Lost 6 inches in 30 Day"**

ABFLEX Homepage

Order Information

EXHIBIT A-9

EXHIBIT A

...y smashed on a users stomach. Unbelievable!!! http://tvshopping.com/abflex/page3.html

Click here Quicktime, Avi to see a loyal ***ABFLEX*** customer have an actual cinder block smashed on his stomach with a sledge hammer. It will make a believer of you!

# The ABFLEX Guarantee :

If you don't lose 5 inches and 10 pounds within 30 days, you can return the ***ABFLEX*** for a full refund.

ABFLEX Homepage

Order Information

EXHIBIT A-10

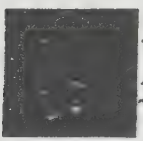
EXHIBIT A

bflex Order Information http://tvshopping.com/abflex/purchase.html

# ABFLEX

THE FASTEST, EASIEST,
SAFEST WAY EVER
TO ACHIEVE:

- **A flat, toned stomach**
- **A shaplier waistline**
- **A healthier back**



**The Complete**
**ABFLEX SYSTEM**

ALL THIS FOR JUST 3 EASY PAYMENTS OF

$19.95

The revolutionary new **ABFLEX** System plus the 1-hour **ABFLEX LIFETIME** Fitness Instructional Video and the 250-page **ABFLEX** Nutritional Guide which lists over 2,000 low-fat foods and gives you over 90 delicious recipes!

Call 800-293-7100 to order NOW

**MAIL CHECK**

**PURCHASE ONLINE**

ABFLEX Homepage

EXHIBIT A-11

EXHIBIT A

Mail Order Form http://tvshopping.com/abflex/mail.html

## Check Orders

I prefer to send the full amount now. Enclose $59.85 plus $7.95 S&H. Total $67.80.

I want to target my side abs for faster trimmer waistline. Please add your special attachment and instructional video. Enclose a total of $80.70

TX res. add 8%, CA res. add 8.25% sales tax. Check Money Order

Print

Name
Address Apt#
City State Zip

Mail to: ABFLEX, Box 6015, Culver City, CA 90233

ABFLEX Homepage

EXHIBIT A-12

EXHIBIT A

Abflex Order Form http://tvshopping.com/abflex/order.htm

# ABFLEX ORDER FORM TO ORDER ON-LINE

## On-Line Credit Card Orders

**YES!** Please rush my **ABFLEX** with a no-risk money-back guarantee!

Charge my credit card for 3 easy payments of only $19.95 each plus $7.95 S&H (4-6 wk delivery)

Charge my credit card for full amount of $59.85 plus $7.95 S&H and *receive free express handling* (2 week delivery)

I want to target my side abs for a faster trimmer waistline, please add your special attachment and instructional video. Charge my credit card an additional $9.95 plus $2.95 S&H.

Martin VanDerHoeven, the inventor of the Abflex, would like you to try *for free* an incredible new all natural weight loss product. A recent scientific study showed that the regular use of this quick slimming formula safely produced a greater level of weight loss, reduced appetite, fewer cravings for sweets and increased energy. Martin will send you a 30-day supply *free* for two weeks. If you choose to keep SlimQuick, your accounts will be charged $14.95 plus $2.95 shipping and handling. So that you never run out, a new bottle will be sent approximately every four weeks and, of course you keep only the bottles you want. Check this paragraph to add to your order.

First Name:
Last Name:

Address: Apt:

City: State:
Zip:

Daytime Telephone:
Evening Telephone:

Email Address:

Credit Card: American Express Visa Mastercard

EXHIBIT A-13

## EXHIBIT A

Abflex Order Form http://tvshopping.com/abflex/order.htm

Card Number:

Expiration Date:

EXHIBIT A-14

EXHIBIT A

:flex Order Form http://tvshopping.com/abflex/order.html

# ABFLEX ORDER FORM TO ORDER ON-LINE

## On-Line Credit Card Orders

**YES!** Please rush my **ABFLEX** with a no-risk money-back guarantee!

Charge my credit card for 3 easy payments of only $19.95 each plus $7.95 S&H (4-6 wk delivery)

Charge my credit card for full amount of $59.85 plus $7.95 S&H and *receive free express handling* (2 week delivery)

I want to target my side abs for a faster trimmer waistline, please add your special attachment and instructional video. Charge my credit card an additional $9.95 plus $2.95 S&H.

Martin VanDerHoeven, the inventor of the Abflex, would like you to try *for free* an incredible new all natural weight loss product. A recent scientific study showed that the regular use of this quick slimming formula safely produced a greater level of weight loss, reduced appetite, fewer cravings for sweets and increased energy. Martin will send you a 30-day supply *free* for two weeks. If you choose to keep SlimQuick, your accounts will be charged $14.95 plus $2.95 shipping and handling. So that you never run out, a new bottle will be sent approximately every four weeks and, of course you keep only the bottles you want. Check this paragraph to add to your order.

First Name:
Last Name:

Address: Apt:

City: State:
Zip:

Daytime Telephone:
Evening Telephone:

Email Address:

Credit Card: American Express Visa Mastercard

EXHIBIT A-15

## EXHIBIT A

Abflex Order Form http://tvshopping.com/abflex/order.htm

Card Number:

Expiration Date:

EXHIBIT A-16

EXHIBIT B

Shell credit card application July 1, 1995

montgomery ward November, 1995

amoco November, 1995

FLATTEN YOUR STOMACH

IN JUST 3 MINUTES A DAY!*



ABFLEX...The Fast, Easy Way to a flat Stomach, Shapely Waistline, and a Healthy Back

*4 days a week if you follow the workout program

FREE 21-Day Home Trial

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

BUSINESS REPLY MAIL

FIRST CLASS MAIL PERMIT NO. 609 ELMHURST, IL

POSTAGE WILL BE PAID BY ADDRESSEE

SHELL MERCHANDISE CENTER
489 W FULLERTON AVE
ELMHURST IL 60126-9484

MOISTEN HERE. FOLD. SEAL AND RETURN POSTAGE-PAID.

100% SATISFACTION GUARANTEED

-FREE FOR 21 DAYS-NO OBLIGATION TO BUY-

| Item Name | Item # | Description | Per Month for 10 Months | Single Payment | Shipping & Handling |
|---|---|---|---|---|---|
| | 009 | ABflex Exercise System | $5.99 | $59.90 | $7.95 |

*Plus FINANCE CHARGE and applicable taxes on your Shell account (See MERCHANDISE TERMS on the reverse side of the enclosed letter. Shell reserves the right to change payment terms at any time.)
†Plus applicable taxes. Orders subject to routine credit approval.

Only Shell gives you this double assurance. Try our merchandise FREE for 21 days with no obligation to buy. If for any reason you should become dissatisfied with the merchandise, during the free trial period, or within 6 months after you buy, you may return it for a complete refund or credit. You owe nothing. This total protection allows you to buy with complete peace of mind and confidence.
Please allow 4-6 weeks for delivery.

Send no money. Your Shell account will be billed.
My Shell account number is: (First 9 digits)

(Please print name as shown on monthly statement)

NAME

STREET NUMBER STREET NAME APT. NO.

CITY STATE ZIP

Signature of person placing order. (Must be signed to be valid.)
X

To secure merchandise on credit or installment, your merchandise order must be signed by the person in whose name the Shell account is carried. You must be at least United Parcel Service or insured U.S. Parcel Post. Shell will reimburse you for insured parcel post or parcel post not insured. Sales tax must be included in price of merchandise where applicable. Merchandise is insured in the event of loss or damage in transit. Merchandise will be delivered to the person named above and shipped by Consolidated Merchandising Corporation, Inc. Allow 4-6 weeks for delivery. Void where prohibited by law.

SBI' 1995

Offer expires October 31, 1995. Made in the U.S.A. 4326-SB

EXHIBIT B


"I look better than I ever have! I workout less, and I eat more, all because of the Abflex." Jenny Lee Harrison, co-star of DALLAS and THREE'S COMPANY...
Home Exercise Machine That Works The Upper, Lower, & Side Abdominals With 1 SIMPLE EXERCISE!
ABFLEX
Flatten your abs with the Abflex. Because the abdominals are non-jointed muscles, direct resistance is the way to work-out these non-jointed muscles. Abflex's patented direct resistance design zeros right in on those hard to target abdominal muscles. The result: You can have a firm flat stomach, and a slim waistline in just 3 minutes a day, 4 days a week!
The Abflex isolates and strengthens the abdominal muscles, without putting excessive stress on the lower back muscles. In fact, by strengthening your abdominals, it may help relieve existing lower back stress and pain.
The Abflex targets the abs much better than sit-ups; it doesn't strain your back like sit-ups, and you don't even have to get on the floor to use it! It's so effective, you can see dramatic results in just a few short weeks. The Abflex is so convenient, you can use it anytime, right at home, in a chair or on the floor. You don't even have to change into workout clothes!
Anyone can use the Abflex, whether you've never worked out a day in your life or even if you're a major fitness buff...because the Abflex "resistance bands" adjust perfectly to your individual strength level with 18 resistance settings, ranging from 5 lbs. to 125 lbs.
We recommend consulting your physician before starting any exercise program
Chest Crunch
Reverse Crunch
Advanced Position
Side Crunch
...ur LIFESTYLE
...hich is like 3 d...
...let demonstrates yo...
...bics tape. 3. It's a d...
...ge Abflex nutritional
...t more than 90 delic...
...get the Abflex guaran...
...thin 30 days, simply

EXHIBIT C

RECOMMENDED BY ORTHOPEDIC DOCTORS TO FIRM STOMACH AND IMPROVE LOWER BACK PERFORMANCE!
INCLUDES VIDEO!
ABFLEX™
The unique Abflex™ System will provide you with the most complete home abdominal workout available anywhere! With an excellent step-by-step video hosted by actress Jenilee Harrison, you'll perform a routine that gradually works you up to ab-isolating floor crunches. For cardiovascular fitness, there's exciting low-impact aerobics led by aerobics champion Ken Rosenthal. Plus a sensible eating program that provides *plenty* of eating satisfaction. Best of all, Abflex™ *flattens your stomach in just 3 minutes a day* – no matter what your current fitness level!
Includes:
• Abflex™
• Medium and Light Resistance Bands and Accessories
• 270-Page Abflex™ Lifestyle Eating Program Book
• Instructional Video
Measures 29" x 19" x 4"
Slice! Dice! Shred! Grate! Chop!
This hand-held "food processor" does it all!
SUPER SLICER™
8-Piece Set includes:
• Spiral Cutter • V-Knife
• Orange Squeezer • Slicer
• Waffle Cutter • Grater
• Instruction Manual • Safety Holder
There's no counter-top mess or tedious hand-cutting with this nifty multi-grater! A complete food preparation system, the Super Slicer™ has 5 interchangeable stainless steel blades that allow you to *grate, chop, shred, slice and much more* – easily and uniformly. There's even a rotary dial that lets you adjust the thickness of the slice with just a twist of your wrist! Designed with safety in mind, the Super Slicer™ is a must for every kitchen!
Rotary dial lets you adjust thickness with the twist of your wrist!
Safety holder prevents accidents!
Measures 13-7/8" x 2" x 4-7/8" Disassembles for easy cleaning; top rack dishwasher safe. 6Slices, dices, shreds, grates & chops in seconds and more!
4 PAYMENTS EACH ONLY $5.49

chances of winning have never been better. That's why I urge you to complete and return your last stage entry today. Because there's a good chance you'll win this time ... maybe even $10,000,000.00!

Cordially,

Robert H. Treller

Robert H. Treller
President
Publishers Clearing House

010450

EXHIBIT D

# GET A FLAT, SEXY STOMACH IN JUST 3 MINUTES A DAY!

## While You Sit In A Chair Or Even Watch TV!

ABFLEX.

**The Fastest, Easiest, Safest Way Ever To Achieve:**

- ☑ A flat, toned stomach
- ☑ A shapelier waistline
- ☑ A healthier back

**HERE'S THE MAGIC OF ABFLEX:**

Only the ABFLEX patented direct resistance design targets all the abdominal muscles simultaneously in one easy exercise to:

- Flatten a bulging tummy
- Eliminate a spare tire • Trim the waistline
- Get rid of those "love handles" at the sides of the waist with its special attachment

Lost 3 inches and 13 pounds in 30 Days!

**DRAMATIC RESULTS IN JUST A FEW WEEKS... AND NO BACK STRAIN!**

Eight out of ten adults have back problems! And the number one cause of back pain is weak abdominal muscles! According to this prominent orthopedic surgeon, ABFLEX can help prevent and in some cases eliminate back problems: *"ABFLEX strengthens your abdominal muscles, but does not put excessive strain on your back muscles – which is a major problem with situps and crunches. ABFLEX isolates and works your abdominal muscles more effectively! It's safer, has the edge over every other product, and it's a lot less expensive!"* – Dr. Lawrence Kurz, M.D.

**YOU CAN SAY GOODBYE TO SITUPS, CRUNCHES, AND LEG LIFTS!**

Just sit in your favorite chair. Place ABFLEX against your tummy, tighten your stomach muscles as you pull the ABFLEX toward you, hold for 3 seconds, then release. Repeat for just 3 minutes a day. It's that easy, fast, safe, affordable!

KENT & SPIEGEL

*The ABFLEX System includes a low-fat diet and aerobic exercise. The results may vary. Consult your physician before beginning any exercise program*

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Jenilee Harrison, famous TV Star. You saw her on Dallas and Three's Company. Now, here's Jenilee introducing ABFLEX on TV:

*"I hate going to the gym. I hate doing situps. That's why I love this ABFLEX! It's the easier, more effective way to stay in shape. You can do it right at home, sitting in a chair. You don't even have to change into workout clothes!"*

**ALL THIS FOR JUST 3 EASY PAYMENTS OF $19.95**

The Revolutionary New ABFLEX System, plus the 1-hour ABFLEX Lifetime Fitness Instructional Video and the 250 page ABFLEX Nutritional guide which lists over 2,000 low-fat foods and gives you over 90 delicious recipes!

You've probably discovered that other methods just don't work! Situps involve just one set of muscles: leg lifts don't involve any significant muscle groups of the stomach! The ABFLEX actually zeros in on the upper, lower and side abs that contour your stomach. That's why ABFLEX can show such remarkable results – in just a few weeks! And there's more...

**OFFERS YOU 18 DIFFERENT RESISTANCE SETTINGS!**

ABFLEX can work for any man or woman regardless of strength because it can be set at as little as 5 pounds for beginners or as much as 125 pounds for the expert!

Martin Van Der Hoeven, ABFLEX inventor, research scientist and former triathlete. He worked for five years to perfect ABFLEX, *"the very first home exercise machine to target all those hard to firm abdominals – upper, lower and side with one easy exercise!"*

By the way, there's only one other machine that's as effective as ABFLEX: that's Mr. Van Der Hoeven's other patented exercise machine, which costs $6,000.00 and can be found only in the finest health clubs!

**ABFLEX NO RISK GUARANTEE**

If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX System for a full refund of your purchase price! You have nothing to lose but your paunch!

See for yourself! ABFLEX is so incredibly easy to use, so effective and so affordable, it even makes conventional exercise and all other equipment obsolete!

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EXHIBIT E

ABFLEX INFOMERCIAL TRANSCRIPT

[Superscript: Kent & Spiegel]

MALE NARRATOR 1: The following is a paid commercial presentation for the Abflex.

Does your stomach look like this? [Superscript: Does Your Stomach Look Like This?]

In just a few minutes a day, it could look like this. [Superscript: It Could Look Like This.]

[Superscript: If You Start Using This.]

If you start using this. It's the revolutionary new ABFLEX [Superscript: Abflex] and it's so easy to use, so affordable and so incredibly effective it makes all these painful exercises and all this high priced equipment totally obsolete. [Superscript: Obsolete]

So join special guest television star Jennilee Harrison [Superscript: Jennilee Harrison] inventor Martin Van Der Hoeven [Superscript: Martin Van Der Hoeven] and martial arts legend Tiger Yang [Superscript: Tiger Yang] and discover the fast way to a firm stomach, a slim waistline and a healthy back on this special edition of Fitness Challenge. [Superscript: Abflex Fitness Challenge] And now, here's the host of Fitness Challenge Van Allen.

VAN: Thank you. Thank you. You're a great audience. Thank you very much and welcome everybody. Well, we've got a great show for you today because we're going to be taking on a fitness challenge that so many of us are facing. We're talking tummies, gang. How do we firm 'em up and slim 'em down. Sometimes it seems hopeless, right? But today we're going to hear about a new machine called the Abflex. Well, they say it can flatten our stomachs in just a few minutes a day. Plus, the inventor of the Abflex, by the way, this is him right here. Alright, calm down ladies. He's going to issue a challenge to everyone here in our studio audience and everyone watching at

## EXHIBIT E

But joining us first is a wonderful actress, you've seen her on Three's Company, you've seen her on Dallas, everybody please welcome Jennilee Harrison.

Alright Jennilee.

Jennilee: Hi!

Van: Welcome to the show.

Jennilee: Thank you. Very nice to be here.

Van: Now, Jennilee, we know you, of course, as an outstanding actress, but you're also quite an athlete. Now, you're a rodeo champion and I've seen you on the cover of a fitness magazine.

[Cuts to Fit and Shape magazine covers]

Jennilee: Oh, I love to stay in shape. But you know one thing, I hate going to the gym. Who has the time today?

Van: Yeah, who has the time? Sure.

Jennilee: And that's why I love the Abflex. [subscript: The Abflex program includes a low fat diet and aerobic exercise.] You know today I look better than I ever have and I work out less and I eat more, all because of the Abflex.

Van: Well, you look great by the way.

Jennilee: Thanks. And you know what, I don't have to do an exercise that I despise which is situps. Don't you just hate doing situps? There is no reason to have to do another one . . .

Van: Wow, that's great!

Jennilee: . . . now that there is an easier, more effective way to flatten our stomachs, thanks to Abflex.

Van: Ahh.

Jennilee: The Abflex, it targets your abs much better than situps do and it doesn't strain your back when you do it like sit ups do.

Van: Sure, oh yeah, it's painful.

Jennilee: And you don't have to get on the floor to use it.

Van: You don't even have to get on the floor?

# EXHIBIT E

Jennilee: No, no, no. 'Cause let me show you, this is how the Abflex works. I'm going to take this chair here. I'm going to put my hands right into these handles, put this pad right here on your bellybutton and you pull it in, you do like a crunch, hold it for just a few beats and slowly release it.

Van: Well look at that. That is really easy.

Jennilee: That's it.

Van: That is so easy.

Jennilee: It's called the Abflex crunch. You can do it right at home sitting in a chair like I am, you can do it on the floor whichever you prefer and anyone can do this whether you have never worked out a day in your life or whether your a major fitness buff because the Abflex adjusts to your strength level. [Superscript: 18 Resistance Settings] There's 18 different settings on it and you can go either from 5 to 125 pounds of resistance. [Superscript: 5 to 125 lbs. Resistance]

Van: So a whole range so anybody can do it.

Jennilee: And here's the best thing about Abflex.

Van: Uh huh.

Jennilee: It targets the abs much better than situps do and you only have to use it three minutes a day.

Van: Three minutes, wait a second. Hey there goes my old excuse about not having enough time to exercise.

Jennilee: No excuses.It's called the three minutes flat Abflex workout [Superscript: 3 Minutes Flat Abflex Workout] It's over before you know it. And you'll get a flat stomach even before you know it. You know I used to have this pooch right here.

Van: Oh yeah.

Jennilee: How many of you?

Van: Oh yeah.

Jennilee: No matter how much I worked out or no matter how much I starved myself or dieted I never could get rid of that and after I started [Subscript: Your results may vary.] the Abflex system it went away within, like, two weeks.

## EXHIBIT E

Van: Incredible. That's fantastic.

Jennilee: Oh yeah it's the best. And let's look at the results some of these people got after just a few weeks on the Abflex system.

[Superscript: Lost 13 lbs in 30 days. Subscript: The Abflex program includes a low-fat diet and aerobic exercise.]

Van: Wow

Jennilee: Isn't that incredible.

Van: Wow, look at that. I mean that's amazing.

Jennilee: Yeah.

[Superscript: Lost 6 inches in 30 days. Subscript: Your results may vary.]

Van: Hey you guys, look at the difference.

Jennilee: And it can work for anybody. Just three minutes a day and you can flatten that tummy right up.

Van: That sounds great.

Male Testim. 1.: You don't even know you are doing, you don't even know you are doing your exercises. And you're doin' it the whole time [Subscript: The Abflex program includes a low-fat diet and aerobic exercise. Your results may vary.] and pretty soon your stomach is like a brick. And you've lose all that weight.

Female Testim. 2.: The fact that I now have a flat stomach, something that I've never had before. It's just, it's great.

Male Testim. 3.: After using the Abflex there's no way I'll return to doing crunch machines and inclined situps cause they didn't isolate my abs the way the Abflex program does.

Female Testim. 4.: I do know that with the Abflex system in two weeks I've seen a difference. That's great.

Female

# EXHIBIT E

Testim. 5.: I saw more results in a week than I did with a month worth of situps.

Male
Testim. 6.: After using the Abflex 30 days [Subscript: The Abflex program includes a low-fat diet and aerobic exercise. Your results may vary.] I lost two inches off my waist and I lost 13 lbs. so I went from a size 36 slacks back to a 34. Perfect.

Van: How does the Abflex produce results so quickly?

Jennilee: Why don't we ask the inventor himself?

Van: What a great idea. Alright, well let's bring him out here. He's a former triathlete and a research scientist, please welcome Martin Van Der Hoeven and the Abflex crew

Welcome to the show. Now Martin, I know that the Abflex seems to really zero in on those abs, but I've always heard they are the hardest muscle to target.

Martin: Well, you know they really are because we have so many different abdominal groups. You have your uppers, you have your lowers, you have your left side, your right side, but even more difficult, they don't flex the same way as your other muscle do. Here's an example. What joint do you think I am moving here?

Van: The elbow.

Martin: That's right. And Jenni, what muscle?

Jennilee: The bicep.

Martin: That's right. This is what we call a jointed muscle because when this joint moves, this flexes. What about a sit up? Think about this here. Now what joint am I moving here?

Jennilee: The hip joint.

Martin: That's right Jenni. And what muscle?

Van: Well, that's easy, the abs, that's why you do sit ups.

Martin: That's wrong.

Van: Wrong?

## EXHIBIT E

Martin: You're really working the hip joint and you're working the hip flexor muscles. The abdominals are a non-jointed muscle. Let me repeat that: Abdominals are non-jointed muscles. They're not attached to joints. And the only way to work out a non-jointed muscle is by direct resistance like the Abflex right here.

Van: Ah, okay.

Jennilee: You know most people have never even felt their abs until they started using the Abflex.

Van: Is that right? So all these exercises that we do to try to flatten our stomachs, they're really not that effective.

Jennilee: That's right

Martin: Here's a sit up, and we're doing the same thing, we're moving the hip joints, but the abs are non-jointed muscles. So you're not getting that full ab workout. You're not getting much of an ab workout at all.

Jennilee: Worst of all, 90% of the stress goes directly into your lower back.

Van: Oh yeah they're painful to do.

Jennilee: Doctors will tell you, sit ups, they do more harm than good. But here's an exercise that I used to do before I knew better. The leg lift. Again, the leg lift will put tons of pressure on your lower back, it's not good for it at all.

[Cuts to article: "She wants exercises to tighten tummy," from Ask Dr. Lamb, Dr. Lawrence Lamb: column]

And Dr. Lawrence Lamb said in his nationally syndicated column [Superscript: . . . Leg lifts don't even involve any significant muscle groups of the abdomen . . . ] that leg lifts don't involve any significant muscle group of the abdomen.

Van: None of them at all?

Jennilee: No.

Van: Gosh.

Martin: Well, you know this is a little better than a sit up, it's an abdominal crunch. You're really working

EXHIBIT E

just this upper abdominal right here, you're not putting much pressure into the lower abs, side abs or the right side abs.

Jennilee: And for us women who are trying to get rid of that pooch down here and for you guys trying to get rid of the love handles, forget it. This exercise is useless. But, now here, this is the answer. This is the Abflex crunch. now when you put the Abflex on there it suddenly isolates all these muscles. It will incorporate [Superscript: works all major abdominals simultaneously ABFLEX] the upper abs, the lower abs and the side abdominal muscles all in one simple exercise.

Van: So this exercise really turns the crunch into the super crunch.

Jennilee: Exactly. And a scientific study proved it.

Using an electromyograph, a device which measures muscle activity, they first tested an ordinary crunch then they tested the Abflex crunch. Look what happened. The Abflex targeted the abdominal muscles so much better the scores literally went off the chart.

Van: Wow! So what that means is that the Abflex is actually going to flatten my stomach faster right?

Martin: Much faster

Jennilee: That's it.

Martin: I spent 45 minutes and over 500 situps doing my abs workout. And this is what I looked like.

Van: Hey you know that's not so bad Martin.

Martin: But do you know after just a few weeks of using the Abflex for only three minutes a day this is what happened. [Subscript: Your results may vary.]

Van: Now hey there's that washboard look all us guys would love to have.

Jennilee: Well you can have it. Look at this woman. If you'd like to go down a few sizes [Superscript: Lost 6 inches in 30 days. Subscript: Best case results. Your results may vary.] the Abflex system is the fast way to lose those inches.

Female

## EXHIBIT E

Testim. 7.: Having children just really wreaks havoc on your body. Especially, especially your stomach muscles. The Abflex really firmed up my lower abs and that's right where I needed it. [Subscript: The ABFLEX program includes a low fat diet and aerobic exercise.] Well I think in about 21 days I've, I've lost about 2 inches.

Female
Testim. 8.: [Subscript: Your results may vary.] After 30 days I lost a full 6 inches. Then I was starting to put on a lot of my clothes that had been sitting way back in the closet and they were fitting. It was so wonderful.

Male
Testim. 1: Four and half inches I lost. I was 39 1/2 and went down to 35. Boom, just like that.

Female
Testim. 9.: With the Abflex I have lost 5 to 6 inches within 30 days and I have seen the results and so has everybody else. It works great.

Van: Well, I have to admit, I mean the Abflex really does seem to do an incredible job of firming up the abs.

Jennilee: And just [Subscript: Consult your physician before beginning any exercise program.] as important is what the Abflex can do for your stomach, is what it can do for your lower back. I want to show you something. Here, hold this.

Van: Whoa.

Jennilee: How much do you think that that watermelon weighs?

Van: I don't know, 9 or 10 pounds?

Jennilee: Do you know that whatever you carry in front of you puts seven times the amount of stress on your back. You carrying 10 pounds here is putting 70 pounds of pressure of stress on your back.

Martin: Wow.

[Subscript: 8 out of 10 adults have back problems.]

Jennilee: Eight out of ten adults have back problems. It costs America $54 billion a year to take care of their backs and the number one cause of lower back pain is poor abdominal muscles.

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[Superscript: Abflex Strengthens Abdominals]

The Abflex strengthens your abdominals so it can relieve lower back pain. Plus the Abflex [Superscript: ABFLEX No Stress on Lower Back] puts no stress on your lower back.

Martin: That's what great about the Abflex. There's so many machines out there that can hurt you and really put stress on the back.

Jennilee: In fact, Abflex is so back safe I know orthopedic surgeons who prescribe it to their patients.

Male Testim. 10.: The Abflex, while it strengthens your abdominal muscles, does not put excessive strain on the lower back muscles [Superscript: Dr. Lawrence Kurz, M.D., Orthopedic Surgeon] that's a big problem with situps and crunches. So it really isolates the abdominal muscles very well, and that's why it has the edge over other products.

Male Testim. 11.: I'd worn a brace for almost a year and a half [Subscript: Consult your physician before beginning any exercise program.] because my back was in constant pain. And after using that for about six weeks, I stopped using the brace and my back started getting better. As my stomach tightened up, [Subscript: Your results may vary.] I also lost a few inches on my stomach.

Male Testim. 6: I felt that with Abflex after I tried it for the first week I found that my back didn't hurt. Crunches I've done in the past, two days later I can hardly even stand up straight.

Testim. 12.: This Abflex apparatus has [Superscript: Randy Frisch, Health Club Director] in one step eliminated all those other opportunities for injury and thus is the safe and quickest most efficient piece of equipment I've ever seen.

Van: Stay tuned folks, coming up on Fitness Challenge, you'll see an amazing display of abdominal strength. But first, here's your chance [Subscript: This is a paid advertisement for the ABFLEX presented by Kent & Spiegel Direct.] to order the Abflex and firm up your abs in just three minutes a day.

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Announcer: Isn't it amazing what we'll put ourselves through to try to flatten our stomachs? Well, finally there is a better way. Introducing the revolutionary new Abflex [Superscript: ABFLEX] The first home exercise machine that works the upper, lower, and side abdominals with one simple exercise. Thanks to its patented direct resistance design, the Abflex zeros in on those hard to target abdominal muscles so it can give you a firm flat stomach and slim sexy waist, in just three [Superscript: 3 Minutes Flat Abflex Workout] minutes a day. The Abflex assembles in just seconds and has 18 different resistance settings [Superscript: 18 Resistance Settings] as little [Superscript: 5 to 125 lbs Resistance] as five pounds for beginners or as much as 125 pounds for experts. [Superscript: No Stress on Lower Back] The Abflex puts no stress on your lower back and its so [Superscript: Dramatic Results in a Few Weeks] effective you can see dramatic results in just a few short weeks.

Female Testim. 13.: [Superscript: ABFLEX] Within, I would say, the third or fourth day that I started using it I started noticing tightening, firmness and my pants had started loosening up a little. I kept continuing using it and before I knew it I was back to a 5/6 from a 9/10 [Subscript: Your results may vary.] It was very dramatic.

Announcer: When you order your Abflex, you'll also receive this one hour long lifestyle fitness video. It's three fantastic videos in one. It's an instructional tape that demonstrates your three minutes flat Abflex workout. It's a 20 minute aerobics tape. It's even a video housecall from a leading back specialist. Plus, if you order now, you'll also receive the 250 page Abflex nutritional guide which lists [Superscript: Over 2000 Low Fat Foods] over 2000 low fat foods and gives you [Superscript: 90 Healthy Recipes] more than 90 delicious healthy recipes. Why spend hundreds [Superscript: $Hundreds$] even thousands of dollars [Superscript: $Thousands$] for another ab machine when you can have the amazing new abflex [Superscript: ABFLEX] along with the video and nutritional guide for [Superscript: Only three payments of $19.95] only three easy payments of $19.95. and you get the Abflex Guarantee [Superscript: Abflex Guarantee If you don't lose 3 to 6 inches and 10 pounds

EXHIBIT E

within 30 days, simply return the ABFLEX for a full refund.] If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX for a full refund of your purchase price. The Abflex, it's the fast way to a flat stomach, a shapely waistline, and a healthy back. So call now [Superscript: 1-800-736-9992. Only three payments of $19.95 Plus $7.95 U.S. or $11.95 Canada S&H. CA & TX Res. add sales tax. Or Send Check or Money Order To: ABFLEX, Box 6015, Culver City, CA 90233. Subscript: ABFLEX 30 day money back guarantee [less S & H].] Have your credit card ready and call the number on your screen to order your Abflex system right now or send a check or money order for the full amount including Shipping, Handling and applicable tax. Only the patented Abflex provides direct resistance for a flat slim stomach in only three minutes a day. And the Abflex guarantee makes it risk free. Lose 3 to 6 inches and 10 pounds within 30 days or return the Abflex system for a full refund of your purchase price. Now, it's easy to have the abs you've always dreamed of. Call now.

[Superscript: Abflex Fitness Challenge]

Van: Alright, welcome back. I'm with Jennilee Harrison and Martin Van Der Hoeven, the inventor of the Abflex, the home exercise machine that can flatten your stomach in just three minutes a day.

Alright, now we've already seen how the Abflex is more effective than exercises like situps or leg raises or crunches, but how does Abflex compare to other machines?

Jennilee: Well, I used to go to the health clubs and I would use a big machine like this to work my upper abs, then I'd find another big machine to work my side abs, but I never found a machine that could target the lower abs until I discovered the Abflex. You can really feel this working. When you place it over your bellybutton and pull it in, you can feel it working the upper abs, the middle and even this lower section which we women really need, especially if you've had a baby.

Van: Oh sure.

Jennilee: The Abflex has even helped me firm up my arms, see as I'm using it. I don't bother going to the health club anymore. The Abflex is so much more

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convenient. You can use it right at home, sitting in a chair while watching TV. You don't even have to change into workout clothes. I love this."

Van: Okay, okay. But, you know, this is a popular machine that you might have seen on TV. Now, how does this compare to the Abflex?

Martin: Well, you know, Van and Jenni, this is a good machine, but it doesn't have direct resistance. And what we've said is without direct resistance for the abs, you can't work all the muscles simultaneously in one exercise. Also, this sit-up motion puts stress on your lower back; the Abflex puts no stress on your lower back.

Jennilee: Plus, this machine -- it takes longer to use, it takes up a lot more space, and it costs three times the amount that the Abflex does.

Van: Okay. But, now, this is more in the Abflex's price range. Now, I've seen this piece of ab equipment advertised on TV. Now what, exactly, does this do?

Jennilee: That's a good question. [Laughter] In a recent issue of a leading fitness magazine, they reviewed this piece of equipment and said it does not enhance the benefit of an abdominal crunch. [Superscript: Cut to excerpt from magazine: "this device does not enhance the benefit of an abdominal crunch] But the Abflex sure does. Here, Van, give it a try.

Van: Well, sure.

Jennilee: Martin . . .

Martin: Let me get over here, okay? Come on down over here.

Van: Okay.

Martin: And, you're going to have an incredible ab workout. Put it right on your belly button.

Van: Alright

Martin: You're going to pull it down and do a crunch. Do that crunch. There you go.

Van: Wow!

Martin: Bring it back --

Van: You know, I can really feel it working the upper and lower abs.

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Martin: You're going to feel it simultaneously in the sides, with your arms there . . .

Van: Yeah, I feel it on the sides, too.

Martin: . . . and right on the lower abs.

Van: Boy, wait 'til you try this, gang. This really does turn a crunch into a super crunch.

Jennilee: See, you can feel the Abflex working right away. In fact, we went to a local mall and asked people to try the Abflex for the very first time. Here's what happened.

Jennilee: Pull this down, towards your stomach. Lift up. Hold for a two count, then release it. Go back slowly. How does that feel compared to a regular sit-up?

[Superscript: ABFLEX]

Male Testim. 1: I can feel it a lot.

Jennilee: A lot.

Male Testim. 1: Feels good. Because it centers on the stomach -- on the stomach muscles, where it counts the most.

Female Testim. 2: I have a back problem, so I really can't do sit-ups. So this is great.

Jennilee: And this puts absolutely no strain on your back?

Female Testim. 2: No strain at all.

Jennilee: And what if I told you you only had to do it three minutes? Five times a week?

Female Testim. 3: I love it, I love it, 'cause I have a little baby and I can't take the time out.

Male Testim. 4: Oh, I feel the tension in the stomach. It feels good.

Male

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| | |
|---|---|
| Testim. 5: | Yeah, I use the gym machines. They don't work at all compared to this. It works really good. |
| Female Testim. 6: | Thirty minutes? Oh, three minutes? Ohhhh. . . Wow. |
| Male Testim. 7: | Oh, yeah. I feel it right there. |
| Male Testim. 8: | Three count, right? |
| Jennilee: | Sure. |
| Male Testim. 7: | Oh, yes. One, two, three . . . Oh, I like that one. You can feel it -- it feels great. |
| Female Testim. 9: | Three minutes a day? Yeah, that is really good. |
| Male Testim. 10: | I can tell that that would firm it up. And in the shorter time -- that's a benefit, definitely. |
| Female Testim. 11: | I feel its working. But it doesn't kill me. |
| Female Testim. 12: | I like this. I'd do this every day. |
| Female Testim. 13: | I can feel it in my stomach right here. It feels like its working. |
| Female Testim. 14: | Ohh. Pressure. Pulling your muscles, yeah. That's great. That's a great thing. |
| Female Testim. 15: | I'm going to take this one. My hands are stuck to this now. |
| Female Testim. 2: | Am I going to get to keep this one? |
| Male Testim. 1: | I like it a lot. I'm going to have to buy me one of these. |

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Van: Now, a minute ago we saw why the Abflex is so much better than other ab equipment, but let's take a look at a machine that can give the Abflex a run for its money.

Jennilee: And guess who invented it.

Van: Uh huh. [Laughter]

Martin: This is my Realflex machine. We introduced it about five years ago, and it was the first ab machine as you could see that had direct resistance.

Jennilee: The Realflex is a great health club machine. But, its too big for home use, and it costs $6,000.

Van: Six thousand . . .

Jennilee: So Martin decided to make a smaller version of this that everyone could afford.

Martin: Well, we spent five years and over a million dollars in creating the home version of the Realflex machine. [Superscript: ABFLEX] And what we ended up with is the Abflex.

Van: Ah. Okay. But tell me, does this work as well as this?

Jennilee: It works even better.

Van: Better than the $6,000 machine?

Martin: I'm convinced the Abflex works the abs better than any machine that's ever existed.

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Male
Testim. 16: I saw results in the first five to seven days. I could see visual results of the Abflex program. [Subscript: Your results may vary] I lost about an inch to an inch-and-a-half in the waist and also lost five pounds. It just doesn't make sense to buy a different ab machine, other than Abflex.

Female
Testim. 17: I definitely have a lot more confidence now, due to using the Abflex machine. I'm not afraid to wear half tops anymore. I don't need to feel I need to cover up my stomach anymore, 'cause its a lot more defined and all my friends are noticing it. Its great.

Female
Testim. 18: Seven months ago I had a baby, and while I was pregnant I went up to 150 pounds. My stomach was out to here. Since using the Abflex, I actually have my waist back to what it was before. I saw more results in a week than I did with a month's worth of sit-ups.

Van: Now, what's going on here? Jennilee has a dozen people up from our audience doin' all kinds of crazy exercises. What are you up to?

Jennilee: Van, a leading fitness magazine said that these are the twelve exercises you should be doing to get yourself a complete ab workout.

Van: Twelve exercises. You mean, I'm supposed to do all these exercises if I want to flatten my stomach?

Jennilee: Well, you have a choice. You can either spend an hour doing all these exercises, or you can spend three minutes doing exercises with the Abflex.

Van: You know, that's a pretty easy choice. I think I'll use the Abflex.

EXHIBIT E

Jennilee: Well, the Abflex is the smart choice. Remember, it puts no stress on your lower back [Superscript: No Stress on Lower Back] so it won't hurt you like some of these other exercises will or those machines can. Its a safe, [Subscript: Consult your physician before starting any exercise program] effective way to firm those abs and flatten those tummies.

[Music starts.]

Male Testim. 19: Its amazing that in our world now of high technology where everything is usually more expensive and bigger, [Superscript: Dr. Lawrence Kurz, M.D., Orthopedic Surgeon] that you have a simple consumer product like Abflex which works your abdominal muscles more efficiently... Its a safer product and a lot less expensive.

Male Testim. 20: The Abflex takes a lot less time and gets a lot more accomplished than sit-ups. I like the Abflex a lot. It has really done what I wanted to do, which is reduce the size of my waist.

Male Testim. 21: I've tried sit-ups in the pool, I've tried sit-ups under the bed -- you name it, I've done it. And I just couldn't seem to get any kind of results out of it. After picking the Abflex up, within the first couple of seconds, I noticed -- I was feelin' somethin' here. You could feel the muscles tightenin' up. It was fabulous.

Female Testim. 22: You could feel 'em.

Male Testim. 23: I'm excited about it. What more can I tell you? I mean, this thing is really workin'. I'm proud of it.

Van: Stay tuned. When we come back, you'll meet legendary Tai Kwan Do champion, Tiger Yang. And, you'll find out just how strong your abs can become if you use the Abflex. [Subscript: This is a paid advertisement for the ABFLEX presented by Kent & Spiegel Direct.]

Announcer: Isn't it amazing what we'll put ourselves through to try to flatten our stomachs? Well, finally there's a better way. Introducing the

EXHIBIT E

revolutionary new Abflex [Superscript: ABFLEX] -- the first home exercise machine that works the upper, lower and side abdominals with one simple exercise. Thanks to its patented direct resistance design, the Abflex zeros in on those hard-to-target abdominal muscles. So it can give you a firm, flat stomach. And a slim, sexy waistline [Superscript: 3 Minutes Flat Abflex Workout] in just three minutes a day. The Abflex assembles in just seconds, and has 18 different resistance settings [Superscript: 18 Different Settings] -- as little as 5 pounds [Superscript: 5 to 125 lbs. Resistance] for beginners or as much as 125 pounds for experts. [Superscript: No Stress on Back] The Abflex puts no stress on your lower back [Superscript: Dramatic Results in a Few Weeks] and its so effective you can see dramatic results in just a few short weeks.

[Superscript: Abflex Subscript: Your results may vary]

Male Testim. 24: After using the Abflex for 30 days, I lost two inches off my waist and I lost 13 pounds. So I went from a size 36 slacks back to a 34. Perfect.

Female Testim. 25: The Abflex is a great investment. Money wise, I would much rather buy this Abflex than any other machine that anybody could show me.

Female Testim. 26: I'm wearing a size four and I've never felt better and I've never been in as good a shape as I am today. And I thank Abflex for it.

Announcer: When you order your Abflex, you'll also receive this one-hour-long lifestyle fitness video. Its three fantastic videos in one. Its an instructional tape that demonstrates your three minutes flat Abflex workout. Its a 20-minute aerobics tape. Its even a video house call from a leading back specialist. Plus, if you order now, you'll also receive the 250-page Abflex nutritional guide, [Superscript: Over 2000 Low Fat Foods] which lists over 2,000 low fat foods and gives you [Superscript: 90 Healthy Recipes] more than 90 delicious, healthy recipes. Why spend hundreds, [Superscript: $Hundreds$] even thousands [Superscript: $thousands$] of dollars for

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another ab machine when you can have the amazing new Abflex, [Superscript: ABFLEX] along with the video and nutritional guide for only three easy payments of $19.95. [Superscript: Only Three Payments of $19.95] And you get the Abflex guarantee. [Superscript: If you don't lose three to six inches and 10 pounds within 30 days, simply return the Abflex for a full refund of your purchase price.]

If you don't lose 3 to 6 inches and 10 pounds within 30 days, simply return the ABFLEX for a full refund of your purchase price. The Abflex, it's the fast way to a flat stomach, a shapely waistline, and a healthy back. So call now

[Superscript: 1-800-736-9992. Only three payments of $19.95 Plus $7.95 U.S. or $11.95 Canada S&H. CA & TX Res. add sales tax. Or Send Check or Money Order To: ABFLEX, Box 6015, Culver City, CA 90233. Subscript: ABFLEX 30 day money back guarantee [less S & H].] Have your credit card ready and call the number on your screen to order your Abflex system right now. Or send a check or money order for the full amount, including shipping, handling and applicable tax. Only the patented Abflex provides direct resistance for a flat, slim stomach in only three minutes a day. And the Abflex guarantee makes it risk free. Lose three to six inches and 10 pounds within 30 days or return the Abflex system for a full refund of your purchase price. Now, its easy to have the abs you've always dreamed of. Call now.

[Superscript: Abflex Fitness Challenge]

Van: All right, we're back. And we're talking about the Abflex -- the machine that makes it easy to flatten our stomachs and firm up our abs. And speaking of firm abs, here's a man who really needs 'em. Please welcome Grand Master, Tiger Yang. [Superscript: Tiger Yang]

Van: Tiger's a three-time heavyweight Tai Kwan Do champion, and a 10th Degree Black Belt. In fact, he's appeared in over 30 Kung Fu movies. He's even been the martial arts instructor for the C.I.A. Tiger, you've used the Abflex. Well, what do you think?

Tiger: I think Martin found secret. Abflex is best way to get strong stomach.

Van: That's coming from a man who knows about abdominal muscles, folks. In fact, he's about to show us just how strong his are. Tiger's assistants are going to

EXHIBIT E

attempt to break three cinderblocks over his stomach. All right. Are you ready, Tiger?

Tiger: I'm ready.

Van: Okay, here goes.

Jennilee: Wait a second. I've got an idea. Why doesn't Martin do this?

Van: Martin -- why Martin?

Jennilee: Martin's been using the Abflex longer than anybody, so his abs should be just as strong as Tiger's.

Martin: Okay. I'll do it.

Tiger: Well, anyway, Martin -- I'm not guarantee you.

Martin: Abflex will guarantee it. Let's try.

Van: Now, folks -- don't try this at home.

[Drumroll]

Tiger: Are you ready, Martin? [Yells loudly and crushes three cinderblocks with a sledgehammer.]

[Music starts]

Tiger: Incredible!

Van: What an amazing display of abdominal strength. You're okay, right?

Jennilee: Are you okay?

Martin: I'm fine.

Van: Let's take a look at that one more time in slow motion. [Superscript: Instant Replay] Whoa! That is incredible.

Van: Well, now you've really convinced me. [Superscript: 1-800-736-9992] The Abflex definitely works.

Jennilee: And it can work for anyone. [Superscript: Lost 12 Inches; Subscript: The Abflex program includes a low fat diet and aerobic exercise.] Think about how great you're going to feel when you start using the Abflex [Superscript: Lost 13 Lbs. in 30 Days; Subscript: The Abflex program includes a low fat diet and aerobic exercise.] and you start losing those inches. [Superscript: Lost 6 Inches in 30

EXHIBIT E

Days; Subscript: Best case results. your results may vary] Think about how great you're going to feel when you look terrific in your jeans again. Anybody can have a great body; [Superscript: Last Chance to Order 1-800-736-9992 by Internet at http:// tvshopping.com] he Abflex makes it easy.

Martin: And I guarantee results. If you don't lose three to six inches and 10 pounds within 30 days, you can return the Abflex for a full refund.

Jennilee: It only take three minutes a day to flatten your tummy. So what are you waiting for? Order your Abflex now.

Van: We can all spare three minutes to get rid of our spare tires, and we can all afford the Abflex, too. It can flatten our stomachs, it can slim our waistlines, its good for our backs -- hey, this is a great machine. Hey, everybody, come on down and try the Abflex.

Announcer: [Superscript: 1-800-736-9992. Only three payments of $19.95 Plus $7.95 U.S. or $11.95 Canada S&H. CA & TX Res. add sales tax. Or Send Check or Money Order To: ABFLEX, Box 6015, Culver City, CA 90233. Subscript: ABFLEX 30 day money back guarantee [less S & H].] Have your credit card ready and call the number on your screen to order your Abflex system right now. Or send a check or money order for the full amount, including shipping, handling and applicable tax. Only the patented Abflex provides direct resistance for a flat, slim stomach in only three minutes a day. And the Abflex guarantee makes it risk free. Lose three to six inches and 10 pounds within 30 days or return the Abflex system for a full refund of your purchase price. Now, its easy to have the abs you've always dreamed of. Call now.

[Superscript: Produced by Mayhew Breen]

Announcer: The preceding was a paid commercial presentation for the Abflex brought to you by Kent and Spiegel Direct. [Superscript: Kent & Spiegel 6133 Bristol Parkway, Suite 150, Culver City, CA 90230]

Announcer: [Intro repeats]

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment received, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1.a. Proposed respondent Abflex, U.S.A., Inc. is a California corporation with its principal office or place of business at 5962 La Place Court, Suite 260, Carlsbad, California.

1.b. Proposed respondent Martin Van Der Hoeven is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of Abflex, U.S.A., Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. *"Weight-loss product"* shall mean any product or program designed to produce weight loss, reduction or elimination of fat, or caloric deficit or to suppress the appetite in a user of the product or program.

3. Unless otherwise specified, *"respondents"* shall mean Abflex, U.S.A., Inc., a corporation, its successors and assigns and its officers; Martin Van Der Hoeven, individually and as an officer of the corporation; and each of the above's agents, representatives and employees.

4. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

### I.

*It is ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the "Abflex," any other exercise equipment, or any other weight-loss product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. About the number of pounds users can lose;

B. About the rate or speed at which users lose weight;

C. About the length of time users must use such product to achieve weight loss;

D. That such product causes fast and significant weight loss;

E. That such product causes a reduction in the size or shape of specific, desired areas of the body;

F. That such product causes a reduction in users' body size or shape, or body measurements; or

G. About the benefits, efficacy, or performance of such product in promoting weight loss, unless, at the time the representation is

made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the "Abflex," any other exercise equipment, or any other weight-loss product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

III.

*It is further ordered*, That respondent Abflex, U.S.A., Inc., and its successors and assigns, and respondent Martin Van Der Hoeven shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating the representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call

into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

*It is further ordered*, That respondent Abflex, U.S.A., Inc., and its successors and assigns, and respondent Martin Van Der Hoeven shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, provided, however, that the duty to deliver a copy of this order to future personnel as required by this Part shall terminate three (3) years after the date upon which this order becomes final. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

*It is further ordered*, That respondent Abflex, U.S.A., Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

*It is further ordered*, That respondent Martin Van Der Hoeven, for a period of five (5) years after the date of issuance of this order,

shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VII.

*It is further ordered*, That respondent Abflex, U.S.A., Inc., and its successors and assigns, and respondent Martin Van Der Hoeven shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on September 18, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

# KAVE ELAHIE

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3770. Complaint, Sept. 19, 1997--Decision, Sept. 19, 1997*

This consent order requires, among other things, the California-based proprietor of M.E.K. International to have competent and reliable scientific evidence to substantiate any claims he makes in the Spanish-language advertisements that certain products reduce or eliminate cellulite and fat, cause weight loss or reduce cholesterol, as well as any other claims concerning the performance, benefits, efficacy or safety of any food, drug or dietary supplement in the future. The consent order also prohibits the respondent from misrepresenting the existence or results of any test or study, and requires any testimonials used in the advertisements either to represent the typical experience of consumers or to be accompanied by a disclosure of the generally expected results.

## *Appearances*

For the Commission: *Erika Wodinsky* and *Jeffrey Klurfeld.*
For the respondent: *Pro se.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Kave Elahie doing business as M.E.K. International ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Kave Elahie is the sole proprietor of M.E.K. International, a California company with its principal office or place of business at 1669 Emeric Street, Simi Valley, California. Individually or in concert with others, he formulates, directs, or controls the policies, acts or practices alleged in this complaint.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to the public, including the "NutraTrim Bio-Active Cellulite Control Cream" (with aminophylline), and the "NutraTrim Weight Loss" tablets (with chromium picolinate) collectively referred to as the NutraTrim products. The NutraTrim products are advertised in Spanish-language magazines, such as Buenhogar. The NutraTrim products are "foods" and/or "drugs"

within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for the NutraTrim products, including but not necessarily limited to the attached Exhibits A through C. These advertisements contain the following statements:

A. "Love handles, cellulite and fat. Now you can eliminate it with NutraTrim Bio-activa cream." (Exhibit A)

B. "Eliminate cellulite. Lose weight in 15 days beginning with the first application." (Exhibit A)

C. "The results are instantaneous and permanent." (Exhibit A)

D. "Imagine a bunch of ice melting under the sun. This is how the cellulite in your body will be disappearing thanks to Bio-Active action of NutraTrim cream." (Exhibit A)

E. "The potent action helps to eliminate the excess water and fat and other wastes that are responsible for cellulite and orange skin. But this is not all. Once you have the perfect body that you have always wanted, you'll have to apply the NutraTrim Bio-Activa only once in awhile and that way you can keep the results that you have always wanted." (Exhibit A)

F. "Until today this is the most secure and beneficial method to eliminate fat and cellulite from your body." (Exhibit A)

G. "Remember the results are guaranteed." (Exhibit A)

H. "Lose up to 35 pounds without having to diet." (Exhibit B)

I. "Yes today you can eliminate fat and cellulite from your body without having to diet and exercise that are impossible." (Exhibit B)

J. "Clinical test results in hospitals and labs have confirmed the actions of chromium formulated with other natural ingredients." (Exhibit B)

K. "NutraTrim is a new treatment that is 100% natural and will help your metabolism to process and eliminate fat and control your appetite." (Exhibit B)

L. "The results are real: You will lose fat and cellulite in the areas that you wish to lose the most. You will feel more active and energetic. It lowers the level of cholesterol in your blood." (Exhibit B)

M. "These results that have been obtained by real multiple tests by scientists and hospitals have proven that the qualities and the ingredients from NutraTrim help to notably eliminate fat and to lessen the level of cholesterol in your blood. Besides, they will not bring down your metabolism. This is very important because it ensures that the weight that you will lose during your treatment will not come back." (Exhibit B)

N. "Call today and see for yourself how easy it is to lose weight forever with NutraTrim. Without dieting and without extraneous exercises or secondary effects. NutraTrim works for real." (Exhibit B)

O. Consumer testimonial: "How I lost 34 pounds in little time, without regimens or diets. Its great. I'll bet you anything that in 4 or 5 weeks you'll be skinny as me. Anabella Torres C." (Exhibit C)

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that one or more of the NutraTrim products:

A. Significantly reduce body fat.
B. Cause significant and rapid weight loss.
C. Reduce serum cholesterol.
D. Increase human metabolism.
E. Cause weight loss without diet or strenuous exercise.
F. Control appetite.
G. Eliminate cellulite or fat.
H. Increase energy.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that scientific studies demonstrate that the NutraTrim products:

A. Significantly reduce body fat.
B. Cause significant and rapid weight loss.
C. Reduce serum cholesterol.
D. Eliminate cellulite or fat.

9. In truth and in fact, scientific studies do not demonstrate that the NutraTrim products:

A. Significantly reduce body fat.
B. Cause significant and rapid weight loss.
C. Reduce serum cholesterol.
D. Eliminate cellulite or fat.

Therefore, the representations set forth in paragraph eight were, and are, false and misleading.

10. Through the means described in paragraph four, respondent has represented, expressly or by implication, that a testimonial from

a consumer appearing in the advertisements for a NutraTrim product reflects the typical or ordinary experience of members of the public who use the product.

11. Through the means described in paragraph four, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph ten, at the time the representation was made.

12. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph ten, at the time the representation was made. Therefore, the representation set forth in paragraph eleven was, and is, false and misleading.

13. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

**Llantas, flacidez, piel de naranja, celulitis, grasa ... Ahora puede eliminarlas con la crema NutraTrim Bio-Activa. Pruébe y convenzase**

# ¡ ELIMINE la celulitis ! ¡ ADELGACE en 15 días y desde la primera aplicación !

**Imagínese un montón de nieve derritiéndose al sol.**

Así es como la grasa de su cuerpo irá desapareciendo gracias a la acción Bio-Activa de la crema NutraTrim. No piense que es una exageración. Desde su primera aplicación, usted podrá comprobar los fantásticos resultados.

**¿ Qué tiene que hacer ?**

Muy fácil. Sólo tiene que aplicarse la crema NutraTrim Bio-Activa, con un suave masaje, en la zona deseada, hasta que desaparezca absorbida totalmente por la piel. Repita la aplicación 2 veces al día y ya está. Así de fácil.

**Los resultados son instantáneos y permanentes.**

No necesitará esperar meses para comprobar los resultados. Desde las primeras aplicaciones usted podrá medir los resultados. La cinta medidora no engaña. NutraTrim no es una crema mágica, sino científica. Gracias a sus componentes Bio-Activos, actúa sobre la linfa, humor acuoso que se halla en diversas partes del cuerpo. Su potente acción ayuda radicalmente a eliminar el exceso de agua, grasa y otros deshechos que son los responsables de la celulitis y de la piel de naranja.

Pero esto no es todo. Una vez conseguida la figura deseada, sólo tendrá que aplicar la crema NutraTrim Bio-Activa de vez en cuando y así podrá mantener los resultados para siempre.

**La opinión de una Doctora.**

La doctora Christine Viviene de Suiza está encantada con los resultados de la Crema NutraTrim Bio-Activa. Es completamente natural y además muy fácil de aplicar. No tiene contraindicaciones y realmente ayuda a eliminar los depósitos de grasa en el cuerpo humano. "Yo lo recomiendo a todos mis pacientes, ya que hasta hoy es el método más seguro y eficaz que conozca para eliminar la grasa y la celulitis del cuerpo."

**100% CALIDAD**

**No acepte imitciones baratas. NutraTrim está elabroado con productos de alta calidad, garantizándole los resultados.**

Used by Famous Hollywood Stars

**OFERTA ESPECIAL**

**50% + GRATIS**

Compre ahora su crema NuTraTrim Bio-Activa y consiga al precio normal de $26.95 el 50% más de crema. Aprovéchese y ahorre.

**¡ No lo dude más !**

Ahora usted tiene la oportunidad de lucir una silueta bonita y atractiva que cause admiración. Imagínese la cara de sus amigas cuando vean su cambio de aspecto. Más atractiva, más juvenil, más segura de si misma. Recuerde que los resultados están garantizados. Dese prisa y envíe hoy mismo el cupón de prueba gratuita y aproveche esta oferta de promoción para mejorar en poco tiempo su aspecto. No se arrepentirá.

**GARANTIA TOTAL**

Pruebe NutraTrim Bio-Activa durante 30 días y si no está satisfecha, devuélvalo y le reintegraremos su dinero, menos los gastos de envío.

**CUPON DE PRUEBA GARANTIZADA**

Recorte y envíe este cupon junto con su chaque o money order a:

**MEX INTERNATIONAL**
9514-2 Reseda Blvd. Suite 115
Northridge, CA 91324

Información y pedidos por Teléfono llamar **(818)888-0224**

Pedidos por tarjeta de Crédito: VISA

Número: _____ - _____ - _____ - _____

Fecha de expiración: _____ / _____

Firma _____

| | |
|---|---|
| 1 crema NutraTrim Bio-Activa 4 oz (Oferta especial 50% + Gratis 2 oz) | $26.95 |
| 2 crema NutraTrim Bio-Activa 4 oz (Oferta especial 50% + Gratis 4 oz) | $48.90 |
| Gastos de manejo y envío añadir | $5.95 |
| Envío urgente 2 días añadir $3.50 (opcional) | _____ |
| *MO COD *CA Residents add 8.25% Tax | Total |

Nombre: _____

Dirección: _____

Ciudad _____

Estado _____ Zip _____

Teléfono _____

## EXHIBIT A

## ENGLISH TRANSLATION OF EXHIBIT A

Love handles, cellulite and fat. Now you can eliminate it with NutraTrim Bio-activa cream. Try it and convince yourself.
Eliminate cellulite. Lose weight in 15 days beginning with the first application.
Imagine a bunch of ice melting under the sun.
This is how the cellulite in your body will be disappearing thanks to Bio-Active action of NutraTrim cream. Do not think that this is an exaggeration. From your first application you will see the fantastic results.
What do you have to do?
Very simple. All you have to do is apply the NutraTrim Bio-activa cream with a soft massage in the area you want until the cream disappears and it is absorbed totally into the skin. Repeat the application 2 times a day and that is it. It is that simple.
The results are instantaneous and permanent.
You don't need to wait months to compare the results for yourself. Since the first application you will be able to see results. Your measuring tape doesn't lie. NutraTrim is not a magic cream. But it is scientific. Thanks to the components of Bio-Active Cream it works over the linfa. This is something that you'll find over different parts of your body. The potent action helps to eliminate the excess water and fat and other wastes that are responsible for cellulite and orange skin. But this is not all. Once you have the perfect body that you have always wanted, you'll have to apply the NutraTrim Bio-Activa only once in awhile and that way you can keep the results that you have always wanted.
The opinion of one doctor, Dr. Christine Viviene from Switzerland, loves the results the NutraTrim Bio-Active has given. It is completely natural and very easy to apply. There is no side effects and in reality it does help to eliminate the deposits of fat in the human body. I recommend it to all my patients. Until today this is the most secure and beneficial method to eliminate fat and cellulite from your body.
100% Quality.
Do not accept cheap imitations. NutraTrim is made of high quality products guaranteeing best results.
Special offer 50% more for free.
Buy your NutraTrim Cream today and get it at the regular price of $26.95 with 50% more cream. Take advantage now and save.
Do not question it any longer.
Now you have the opportunity to have a beautiful silhouette. You'll be so attractive you'll cause admiration. Imagine your friends faces when they see the change in your body. More attractive more younger looking and more secure of yourself. Remember that the results are guaranteed. Hurry and mail your coupon today and take advantage of the promotional offer to look better in less time than you expect. You will not regret it.
Total Guarantee.
Try NutraTrim Bio-Active for 30 days and if you are not happy with the results you can return it and we will return your money minus shipping and handling.

EXHIBIT B

EXHIBIT B

**NOVEDAD MUNDIAL**

# Adelgace hasta 35 lbs. Sin ninguna dieta!

## Este revolucionario tratamiento le ayuda verdaderamente a quemar la grasa

Sí, ahora usted puede eliminar la grasa y la celulitis de su cuerpo sin necesidad de dietas y ejercicios imposibles. Las pruebas clínicas realizadas en los Hospitales y Laboratorios han confirmado que la acción del Chromium, formulado con otros ingredientes naturales, permite:

- Controlar su apetito, incluso por dulces.
- Ayudar al metabolismo a quemar grasa.
- Preservar el tejido muscular aun sin ejercico.

Con estos resultados esta vez no puede faller. Usted adelgaza seguro o le devolvemos su dinero!

No pierda más tiempo ni dinero en productos y dietas milagrosas. NutraTrim es el nuevo tratamiento 100% natural que ayuda a su metabolismo en el proceso de eliminar grasa y control del apetito. Por su composición (minerales, vitaminas y extractos de plantas) NutraTrim es apto para personas de todas las edades y sexos.

***NutraTrim es el sistema mas rapido y eficaz para adelgazar. Compruebe como el peso desaparece y ya no vuelve. (sin receta médica)***

Llame ahora mismo y compruebe que fácil es perder peso para siempre con NutraTrim. Sin dietas, sin ejercicios extenuantes, sin efectos secundarios. NutraTrim funciona de verdad.

**Los resultados son reales:**

- ***Perdida de grasa y celulitis en las zonas deseadas.***
- ***Ayuda a conseguir su peso ideal.***
- ***Sentirse mas activo y energico.***
- ***Rebaja los niveles de colesterol en la sangre.***

Estos resultados obtenidos en las multiples pruebas realizas, por cienti ficos y hospitales, demuestran que las cualidades de los ingredientes de NutraTrim ayudan notablemente a eliminar la grasa y a disminuir los niveles de cloresterol en la sangre. Además no retrasa su metabolismo. Este aspecto es muy importante, pues le asegura que el peso que vaya a perder durante el tratamiento no lo recuperará de nuevo.

**Las ventajas de Nutra Trim:**

- *100% natural. Es apto para todo tipo de personas.**
- *No contiene excitantes ni anfetaminas.*
- *No produce mal estar, ni dolores de cabeza, ni mareos o nerviosismo.*
- *No requiere compra de comida especial.*
- *No hay que seguir planes o dietas exageradas.*
- *No produce estrias en la piel.*
- *No produce flacidez o aguamiento de los tejidos.*

* Si usted tiene problemas de salud debe consultar primero con su doctor. Para obtener mejores resultados deberá controlar sus comidas y ayudarse con algo de ejercicio.
NutraTrim es un producto registrado y sólo se puede comprar a través de esta oferta, o dirigéndose directamente a MEK INTERNATIONAL

**MEK INTERNATIONAL Tel 818-888-0224**

# ¡Definitivo!

Envie este cupón junto con su cheque o money order a:
MEK INTERNATIONAL
9514-2 Reseda Blvd Suite 115
Northridge, CA 91324

Visa & MC llamar:
818-888-0224

☐ Money Order ☐ Cheque ☐ Visa/MC
Pedidos por tarjeta de Crédito
Numero ____ - ____ - ____ - ____
Fecha de expiración ____ / ____
Firma _____
Nombre _____
Direccion _____
Ciudad Estado ZIP Telefono

| Deseo perder | ☐ 0-15 lbs | ☐ 15-35 lbs |
|---|---|---|
| -1 tratamiento NutraTrim | $26 95 | $39 95 |
| -Manejo y envio | 5 95 | 5 95 |
| | 32 90 | 45 90 |
| -Envio urgente 2 días (opcional) | 3 50 | 3 50 |
| | 36 40 | 49 40 |

-No COD
**Residentes de CA añadir 6 25% tax

Ordenelo Ahora

ins

## EXHIBIT B

## ENGLISH TRANSLATION OF EXHIBIT B

World News. Lose up to 35 pounds without having to diet. This revolutionary new treatment, in reality will help you lose fat. Yes today you can eliminate fat and cellulite from your body without having to diet and exercise that are impossible. Clinical test results in hospitals and labs have confirmed the actions of chromium formulated with other natural ingredients:
Will control your appetite including sweets.
Will help your metabolism to burn fat.
Will preserve your muscular tissue without having to exercise.
With these results this time you will not fail. You will lose weight or we will refund your money.
Do not lose more time or money with products or diets that promise you the world. NutraTrim is a new treatment that is 100% natural and will help your metabolism to process and eliminate fat and control your appetite. Because of this composition (minerals, vitamins, plant extracts) NutraTrim can be used by persons of all sexes and ages.
The results are real:
You will lose fat and cellulite in the areas that you wish to lose the most.
They will help to ensure your ideal weight.
You will feel more active and energetic.
It lowers the level of cholesterol in your blood.
These results that have been obtained by real multiple tests by scientists and hospitals have proven that the qualities and the ingredients from NutraTrim help to notably eliminate fat and to lessen the level of cholesterol in your blood. Besides, they will not bring down your metabolism.
This is very important because it ensures that the weight that you will lose during your treatment will not come back.
The advantages of NutraTrim:
100% natural.
Any person can use it.
Does not contain uppers or amphetamine.
Does not induce upset stomach, headaches, dizziness, nervousness.
This does not require a special diet.
You do not have to follow a diet plan.
Does not produce extra/hanging skin.
If you have any problems with your health you should consult your doctor first. For better results you should control your meals and try to help yourself with some type of exercise.
NutraTrim is a registered product and you can only buy it through MEK.
NutraTrim is the quickest and most convenient system to lose weight. You should see for yourself how the weight disappears and stays off (without a doctor's prescription).
Call today and see for yourself how easy it is to lose weight forever with NutraTrim. Without dieting and without extraneous exercises or secondary effects. NutraTrim works for real.
100% guaranteed. Try NutraTrim and if you are not completely satisfied we will return your money less shipping and handling.

EXHIBIT C

ANABELLA NOS CUENTA:

# "Cómo logre perder 34 libras en poco tiempo"

## ... SIN HACER REGIMEN Y SIN REGANARLAS.

Toda mi vida tuve tendencia a engordar. Cuando nació mi niño me puse enorme. Por supuesto, había probado un montón de cosas, me privaba de todo. Nada me servía. ¡Tenía realmente la impresión de ser un caso perdido! Se diría que estaba "hinchada" por todas partes: las piernas, el estómago, la cara... ¡Ni siquiera sabía como vestirme, me encontraba horrorosa y sentía que mi esposo no me encontraba atractiva como antes!

**Un descubrimiento casi increíble!.**

Tengo una amiga, no sé lo que hace ¡no se priva de nada, come más que tres y hace por lo menos ocho años que recuperó (y conservó) una verdadera línea de modelo!)

Una día le pregunté: "¿Qué haces para estar siempre tan delgada?" Me confesó su secreto: un procedimiento llamado NutraTrim que había descubierto hacía algunos años.

Me explicó: "Con esto, seguro que adelgazas, aunque comas demasiado, aunque lo hayas probado todo y no te haya servido de nada. No hay que tomar ninguna medicina, ni hay que hacer ningún ejercicio. Este sistema no tiene nada que ver con todos esos sistemas que se encuentran en el mercado, ni con ninguno de los regímenes que hayas podido probar hasta ahora"

Incluso me dijo: "No te digo más, lo vas a ver, ¡es genial! ¡Te apuesto lo que quieras a que en cuatro o cinco semanas estarás tan delgada como yo!

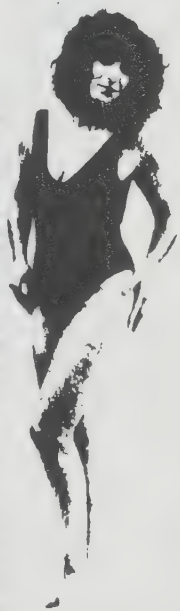
Sin creérmelo demasiado, le prometí probar y le aposté una buena cena estaba segura de ganar. Estaba segura de que aunque le hubiera hecho adelgazar a ella, a mí no me haría adelgazar.

Empecé a utilizar el sistema al día siguiente. Si no quieren, no me crean, pero a los tres días ya había perdido cuatro libras y media... ¡Parecía un milagro! Esa mañana, me encontraba bien, muy ligera, con la piel muy suave: Hasta mi esposo notó la diferencia y empezó a admirarme, cosa que no hacía desde hace muchísimo tiempo.

**La primera semana ya había perdido 10 libras.**

Seguí, porque era realmente fácil y muy agradable. Después de cada sesión de NutraTrim experimentaba la misma sensación deliciosa de bienestar... además, tenía la felicidad de ver como la aguja del peso se inclinaba hacia la izquierda. Al mirarme al espejo, veía mi línea afinarse, remodelarse día tras día. Se habían acabado los regímenes y las privaciones, comía todo lo que quería y adelgazaba a simple vista... ¡Imagínense, había perdido días libras la primera semana! En poco más de un mes, baje de 173 libras a 138 libras de menos, había cambiado completamente de forma. Literalmente, me había "desinflado". Mis piernas, mis caderas se habían afinado y mi estómago estaba muy plano. Mi amiga había ganado su apuesta y yo no he vuelto a subir de peso, lo único que he reganado es mi marido porque creo que se ha enamorado otra vez, porque ha vuelto a ser atento y delicado, como cuando lo conocí.

(Sigue en página 2)



"Ahora he recuperado una línea de jovencita, ya no tengo ninguna vergüenza y estoy orgullosa de que me vean en traje de baño. Nunca hubiera creído que fuera tan fácil, porque había probado tantas cosas para adelgazar, excepto una..."

**¡También tiene que funcionar con usted!**

Hablé con mi médico del tratamiento. Me explicó que era el medio ideal y verdaderamente eficaz para adelgazar, porque actúa muy deprisa, drenando la grasa fuera de las células, sobre todo en las partes del cuerpo que más necesitan adelgazar: el estómago, las piernas, la cara... Además, tuve la agradable sorpresa de que mi piel se había vuelto más firme, más suave y más flexible.

*Anabella Torres C.*

**¿Funciona realmente este sistema para adelgazar?**

Utilizando el sistema NutraTrim (de fácil empleo), obtendrá resultados evidentes desde la primera sesión. En 48 horas habrá perdido ya 2 a 4 libras. Luego adelgazará día tras día hasta que llegue a su peso ideal.

Cuando se mire al espejo se quedará estupefacta de ver que ha adelgazado precisamente en los lugares en que más lo necesitaba: el estómago, las piernas, las caderas. Su piel se volverá más suave y más agradable de acariciar...!

Para ordenar llamado
Tel 818 888 0224

**¡Aprovéchese de esta oferta única y garantizada!**

¿Quiere ser más seductora? ¡Quiere también ponerse esos vestidos que tanto le gustan? ¿Quiere tener un esposo orgulloso de usted y enamorado locamente como al principio?

De usted depende, no permita que su esposo siga admirando a otras mujeres... Como Anabella y como todas aquellas que lo han conseguido, se quedará absolutamente encantada de los resultados que obtendrá con el tratamiento NutraTrim. Perderá usted entre 5 a 10 libras por semana hasta que llegue al peso que se haya propuesto. En caso contrario, si no está usted 100% entusiasmada de su pérdida de peso, devuelva sencillamente el embalaje que contenía su tratamiento y a vuelta de correo le devolveremos su dinero, sin ninguna condición, sin hacerle ninguna pregunta.

**Importante:**

**Satisfacion 100% garantizada.**

Utilice usted el sistema NutraTrim corriendo nosotros con todos los riesgos. Tiene usted que ver, día tras día, como baja de peso. Si no pierde usted todas las libras que le sobran, sin ejercicios ni privaciones, tendrá 30 días para devolver el embalaje que contenía su tratamiento y a vuelta de correo le devolveremos su dinero, sin condición alguna, sin hacerle ninguna pregunta.

¿No le parece a usted que si podemos permitirnos hacerle una proposición como ésta, es porque los resultados son absolutamente seguros?

No espere más. Devuelva el bono adjunto ahora mismo, hoy mismo. Así estará segura de no tener que esperar y de empezar a adelgazar en los próximos días.

**Ordenelo Ahora**
**NutraTrim Pastillas**

Recorte este cupón y envíe junto con su cheque o money order o cash a:

MEK INTERNATIONAL
9614 Reseda Blvd, Suite 2-113
Northridge, CA 91324-2389

Visa & MC llamar:
1-818-888-0224

☐ Money Order ☐ Cheque ☐ Cash ☐ Visa/MC

| Deseo perder | ☐ 3-15 lbs | ☐ 15-30 lbs |
|---|---|---|
| Tratamiento NutraTrim | $26.95 | $39.95 |
| Manejo y envío | 5.85 | 5.85 |
| | 32.80 | 45.80 |
| Envío urgente 2 días | 3.50 | 3.50 |
| | 36.40 | 48.40 |

** Residentes de CA añadir 8.25% tax
** NO pago contra entrega

Pedidos por tarjeta de Crédito.
Número
Fecha de expiración
Firma
Nombre
Dirección
Ciudad
Estado Zip
Teléfono
( )
Cada = 1MB

## EXHIBIT C

## ENGLISH TRANSLATION OF EXHIBIT C

How I lost 34 pounds in little time, without regimens or diets.
All my life I have been gaining weight. When my baby was born I gained so much weight. Of course I tried so many different things. Nothing would work for me. I really thought that I was a lost cause. You could just say that I was swollen in all of my body, legs, stomach and face. I didn't even know how to dress. I looked horrible and I felt like my husband didn't see me as attractive as before.
I discovered something incredible.
I have a friend. I don't know what she does. She doesn't deprive herself from anything. She eats more than three and for the past year she lost her weight and maintained her body like a model.
One day I asked her what do you do to be so skinny? She confessed her secret to me. A product called NutraTrim that was distributed a couple of years ago.
Let me explain. With this I'm positive that you'll lose weight. Even if you eat a lot. Even if you have tried everything and it didn't work. There is no need to take any medication, no exercise. This product does not have anything to do with others in stores. It has nothing to do with the product you took before. She told me I wouldn't tell you more. You'll see it. Its great. I'll bet you anything that in 4 or 5 weeks you'll be skinny as me.
Without believing me too much, I promised her I would try it, and I bet her a good dinner, I was sure to win. I was sure that if it made her lose weight, it would make me lose weight.
I began to use the system the next day. If you don't want to, then don't believe me, but on the third day I had lost 4 ½ lbs. It seemed like a miracle! That morning, I was well, very light with soft skin. Even my husband noticed the difference he started to admire me, something he hadn't done for a long time.
The first week I had already lost 10 lbs.
I continued because it was really easy and very pleasing. After every NutraTrim session, I experienced the same delicious sensation of well-being, besides I had the joy of seeing how the scale marker kept moving to the left. As I saw myself in the mirror, I could see my shape toning, remodeling day after day. Regimes and deprivations have ceased, I ate everything I wanted and I lost weight like that. Imagine, I had lost pounds the first week! In over a month, I went from 173 lbs to 138 lbs, I had a complete change in form. I had literally "uninflated." My legs, my hips had uninflated and my stomach was very flat. My friend had won her bet and I haven't gained weight; the only thing I have gained is my husband because I think he fell in love again because he has begun to be attentive and delicate like when I knew him.
It also has to work for you!
I spoke with my doctor concerning the treatment. He explained that it was the ideal method truly efficient to lose weight because it works quickly, draining the fat out of the cells, above all on the body parts that mostly need thinning: stomach, legs, face. Besides I had the pleasant surprise that my skin had returned to being more firm, more soft and more flexible.
Anabella Torres C.
This system for weight loss really works.

407 Complaint

Utilizing the NutraTrim system (easy work) obtain evident results from the first time. In 48 hours you could lose 2 to 4 pounds. Then you will lose weight day by day until you have your ideal weight.

When you look at yourself in a mirror you will be surprised. To see that you have lost weight in places where you need it. Stomach, legs, hips. Your skin will turn more soft and silky.

Would you like to be more seductive? Would you like to be able to wear those dresses that you like a lot? Would you like to have a husband who is proud of you and crazy in love with you, just like the beginning? It is up to you. Don't permit that your husband keep admiring other women. Like Anabella and all others who have done it, you will be absolutely delighted from the results which you will obtain from the treatment NutraTrim. You can lose from 5 to 10 pounds a week until you reach the weight you want.

If you are not 100% delighted and enthusiastic with your weight loss, simply return the container that had the treatment and we will return your purchase price without any conditions or any questions.

Don't you think that we wouldn't make you a proposition like this unless the results were real.

Don't wait any more. Return the coupon below, right now, today. Don't need to wait to start to lose weight.

Important: Satisfaction 100% guaranteed.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Kave Elahie is the sole proprietor of M.E.K. International, a California company with its principal office or place of business at 1669 Emeric Street, Simi Valley, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For the purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results; and

2. Unless otherwise specified, *"respondent"* shall mean Kave Elahie, individually and doing business as M.E.K. International, his successors and assigns and each of his officers agents, representatives, and employees.

3. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the "NutraTrim Bio-Active Cellulite Control Cream," or "NutraTrim Weight Loss" tablets, or any other food, drug, or dietary supplement, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That such product causes, aids, facilitates or contributes to reducing body fat;
B. That such product causes, aids, facilitates or contributes to causing rapid weight or body fat loss;
C. That such product causes or assists in causing weight or fat loss without dieting or strenuous exercise;
D. That such product reduces serum cholesterol levels;
E. That such product increases human metabolism;
F. That such product controls appetite;
G. That such product increases energy or stamina; or
H. That such product eliminates cellulite or fat;

unless at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

*It is further ordered*, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the "NutraTrim Bio-Active Cellulite Control Cream," or "NutraTrim Weight Loss" tablets, or any other food, drug, or dietary supplement, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding the performance, benefits, efficacy, or safety of such product, unless at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

*It is further ordered*, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the "NutraTrim Bio-Active Cellulite Control Cream," or "NutraTrim Weight Loss" tablets, or any other food, drug, or dietary supplement, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any misrepresentation, in any manner, expressly or by implication, regarding the existence, contents, validity, results, conclusions, or interpretations of any test or study.

IV.

*It is further ordered*, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondent discloses, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

V.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VI.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VII.

*It is further ordered*, That respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with

consumers or with governmental or consumer protection organizations.

VIII.

*It is further ordered*, That respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

*It is further ordered*, That respondent Kave Elahie, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Regional Director, Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, California.

X.

*It is further ordered*, That respondent shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

XI.

This order will terminate on September 19, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation

of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

# BUTTERWORTH HEALTH CORPORATION, ET AL.

*Docket 9283. Interlocutory Order, September 25, 1997*

## ORDER GRANTING MOTION TO DISMISS

On July 22, 1997, respondents Butterworth Health Corporation and Blodgett Memorial Medical Center ("the Hospitals") filed a Motion to Dismiss the complaint in the above-captioned case pursuant to Section 3.26(d) of the Commission's Rules. Complaint counsel filed an Opposition to Respondents' Motion to Dismiss the Proceedings on August 5, 1997. On August 15, 1997, the Hospitals moved for leave to file a Reply Memorandum and on September 2, 1997, complaint counsel moved for leave to file a Response to Respondents' Reply Memorandum. Both motions for leave to file supplemental pleadings are granted.

These proceedings follow the Commission's filing of an action in the United States District Court for the Western District of Michigan seeking a preliminary injunction under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), to prevent a proposed merger of the Hospitals pending completion of an administrative proceeding to determine whether the proposed merger violates Section 7 of the Clayton Act. 15 U.S.C. 18. On September 26, 1996, the district court issued an opinion denying a preliminary injunction. *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996). Thereafter, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision in an unpublished *per curiam* opinion. *FTC v. Butterworth Health Corp.*, No. 96-2440 (6th Cir. July 8, 1997) (*per curiam*).

The rationale for Rule 3.26(d), pursuant to which the Hospitals move, is that although denial of injunctive relief by the courts does not compel the Commission, as a matter of law, to terminate its administrative case, such judicial action justifies respondents in asking the Commission to review closely whether further proceedings are appropriate. The Commission's Policy Statement on Administrative Merger Litigation Following the Denial of a Preliminary Injunction, which was published with Rule 3.26(d), states that the Commission must determine whether to continue or terminate

an administrative proceeding on a case-by-case basis. 60 Fed. Reg. 39,741, 39,743 (1995); 4 Trade Reg. Rep. (CCH) ¶ 13,242 at 20,994.

In determining whether to continue the administrative litigation, the Commission has considered the following factors set forth in the Commission's Policy Statement:

> (i) The factual findings and legal conclusions of the district court or any appellate court, (ii) any new evidence developed during the course of the preliminary injunction proceeding, (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation, (iv) an overall assessment of the costs and benefits of further proceedings, and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge.

*Id.* After considering the pleadings and each of these five factors, the Commission has determined that further administrative litigation is not in the public interest.

Accordingly,

*It is ordered*, That respondents' motion for leave to file a reply and complaint counsel's motion for leave to file a response to the reply be, and they hereby are, granted;

*It is further ordered*, That respondents' motion to dismiss be, and it hereby is, granted.

Chairman Pitofsky recused.

IN THE MATTER OF

# GLOBAL WORLD MEDIA CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3772. Complaint, October 9, 1997--Decision, October 9, 1997*

This consent order, among other things, requires a California-based company and its officer, the marketers of a supplement known as "Herbal Ecstacy," to substantiate all future safety claims for any food, drug or dietary supplement, and requires a disclosure statement warning consumers of the potentially serious safety risks of taking Ecstacy or any other product containing ephedra. In addition, the consent order prohibits the respondents from promoting Ecstacy or any similar product for its mind-altering effects in media with a predominant youth audience, and prohibits misrepresentations of testimonials or endorsements of any product.

## *Appearances*

For the Commission: *Nancy Warder, Michelle Rusk* and *C. Lee Peeler.*

For the respondents: *William H. Dailey,* Encino, CA.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Global World Media Corporation, a corporation, and Sean Shayan, individually and as an officer of the corporation ("respondents"), have violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Global World Media Corporation is a California corporation with its principal office or place of business at 1501 Main Street, Venice, California.

2. Respondent Sean Shayan is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Global World Media Corporation.

3. Respondents have advertised, labeled, offered for sale, sold, and distributed products to the public, including Ecstacy or Herbal Ecstacy tablets ("Ecstacy"). The principal ingredient in Ecstacy is

Ma-Huang, a botanical source of ephedrine alkaloids. Ecstacy also contains, among other things, the following ingredients: guarana, ginseng, ginkgo biloba, cola nut, and green tea extract. Ecstacy is a "food" and/or "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated, or have caused to be disseminated, advertisements for Ecstacy, including but not necessarily limited to the attached Exhibits A through D, and oral representations as set forth in subparagraph E below. In addition, respondents have furnished the means and instrumentalities to third party distributors to disseminate advertising on the World Wide Web, including but not necessarily limited to the attached Exhibits E and F. These advertisements and oral representations contained the following statements:

A. Ecstacy®
The world's first organic ecstacy (m.d.m.a.) alternative
From Tokyo to South Africa to the United Kingdom to Argentina, with over 2 million units sold in over 15 countries, a product known as herbal ecstacy® is revolutionizing the way the world thinks of designer drugs. Using 9 exotic botanicals imported exclusively for this product, herbal ecstacy® has been carefully formulated to produce a considerable range of pleasurable effects.
"Reported effects last 4-8 Hours:
* euphoria
* tingly skin sensations
* highly increased energy levels
* increased sexual sensations
* mood elevation
(a mild serotonin inhibitor)"
Dr. Janis Burton, New Psychology Magazine, Paris, France.
"Developed by many of the same doctors who created the chemical version, herbal ecstacy® is 100% natural & absolutely safe. herbal ecstacy® contains no chemicals or other impurities. This product is synergistically blended in order to maximize benefits and eliminate any possible side effects." Dr. Steven Jonson, Tel Aviv, Israel. (Exhibits A and B: Penthouse.)

B. 2 dosages (10 tablets) $19.99
12 dosages (60 tablets) $99.99
18 dosages (90 tablets) $149.99
40 dosages (200 tablets) $299.99 (Exhibit A: Penthouse.)

C. 2 doses (10 tablets) $19.99
10 doses (50 tablets) $69.99
20 doses (100 tablets) $99.99 (Exhibit B: Penthouse.)

D. toll free -- 24 hour -- 7 days
1 - 800 - 365 - 0000 (Exhibits A and B: Penthouse.)

E. Consumers calling respondents' toll-free "800" number have been advised that if they fail to achieve the advertised euphoric, psychotropic, or sexual effects, they may ignore the dose suggested in advertising and labeling for the product (such as one (1) tablet every seventy-two (72) hours) and take more Ecstacy tablets, including doses of seven or eight tablets at one time.

F. Send Check or money order to: Global World Media Corporation
Distribution and wholesale inquiries: FAX (310) 581-4456
(Exhibits A and B: Penthouse.)

G. SPOKESWOMAN: Introducing Herbal Ecstacy.
[Various shots of young people dancing, playing drums, embracing.]
SPOKESWOMAN: The world's first organic designer experience. A sacred blend of nine exotic herbs that produce a considerable range of pleasurable effects.
[SUPERSCRIPT: Satisfaction Guaranteed]
SPOKESWOMAN: Increased energy levels. Euphoric sensations with absolutely no side effects...Herbal Ecstacy. The alternative...
(Exhibit C: Nickelodeon, 1995)

H. MALE ANNCR.: Are you ready for this? Introducing the world's first organic ecstasy alternative.
. . . .
MALE ANNCR.: Users reported keeping a clear head and a sense of heightened perception all night long with no side effects what so ever. So try the alternative, try Herbal Ecstasy.
. . . .
MALE ANNCR.: The world's first organic ecstasy alternative . . . .
(Exhibit D: Radio Commercial Transcript, 1995)

I. Herbal Ecstacy
"A fantastically light headed, tingly happy, happy buzz, with no side effects."
Herb Garden Magazine, UK.
"The effects of herbal ecstacy beyond smart drug capacity include:
euphoric stimulation
highly increased energy levels
tingly skin sensations
enhanced sensory processing
increased sexual sensations
mood elevations
Dr. Janis Burton New Psychology Magazine
(Exhibit E: World Wide Web Site, March 27, 1996)

J. ecstacy
The Legal Alternative!
"A fantastically light headed, tingly happy-happy buzz, with no side effects."
Herb Garden Magazine, U.K.
"The effects of herbal ecstacy beyond smart drug capacity include:
euphoric stimulation
highly increased energy levels
tingly skin sensations
enhanced sensory processing
increased sexual sensations
mood elevations"

Dr. Janis Burton - New Psychology Magazine

. . . .

10 tab pack - sug. dose 5 tabs.
(Exhibit F: World Wide Web Site, March 27, 1996)

6. Through the means described in paragraph five, respondents have represented, expressly or by implication, that use of Ecstacy in the doses recommended or in other reasonably foreseeable amounts is absolutely safe and will cause no side effects.

7. In truth and in fact, use of Ecstacy in the doses recommended or in other reasonably foreseeable amounts is not absolutely safe and may cause side effects. The Ma-Huang in Ecstacy is a botanical source of various chemicals including ephedrine alkaloids that can have dangerous effects on the central nervous system and heart. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph six, at the time the representation was made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that the representation set forth in paragraph six, at the time the representation was made. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. Through the means described in paragraph five, respondents have represented, expressly or by implication, that Dr. Steven Jonson of Tel Aviv, Israel, provided an endorsement pertaining to the absolute safety and the lack of side effects of Ecstacy, and that the endorsement appearing in the advertisements for Ecstacy accurately reflects his actual opinions, findings, and beliefs.

11. In truth and in fact, Dr. Steven Jonson of Tel Aviv, Israel, did not provide an endorsement pertaining to the absolute safety and the lack of side effects of Ecstacy. Dr. Jonson is a fictitious person and, therefore, the endorsement appearing in the advertisements for Ecstacy does not accurately reflect the actual opinions, findings, or beliefs of Dr. Jonson.

12. In their advertising and sale of Ecstacy tablets, including in media with a substantial youth audience such as certain Nickelodeon and MTV cable programming stations, respondents have represented that Ecstacy tablets are a safe alternative to illegal drugs to produce euphoric, psychotropic, or sexual enhancement effects. Respondents have failed to disclose that use of Ecstacy tablets in the doses

recommended or in other reasonably foreseeable amounts may present a significant health or safety risk, including but not limited to dangerous effects on the central nervous system and heart. These facts would be material to consumers in their purchase and use of Ecstacy tablets. This practice was, and is, a deceptive act or practice.

13. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

ecstacy®

**the world's first organic ecstacy (m.d.m.a.) alternative**

From Tokyo to South Africa to the United Kingdom to Argentina, with over 2 million units sold in over 15 countries, a product known as herbal ecstacy® is revolutionizing the way the world thinks of designer drugs. Using 9 exotic botanicals imported exclusively for this product, herbal ecstacy® has been carefully formulated to produce a considerable range of pleasurable effects.

"Reported effects last 4-8 Hours:

- euphoria
- tingly skin sensations
- highly increased energy levels
- increased sexual sensations
- mood elevation (a mild serotonin inhibitor)"

Dr. Janis Burton
New Psychology Magazine
Paris, France

"Developed by many of the same doctors who created the chemical version, herbal ecstacy® is 100% natural & absolutely safe. herbal ecstacy® contains no chemicals or other impurities. This product is synergistically blended in order to maximize benefits and eliminate any possible side effects."

Dr. Steven Jonson
Tel Aviv, Israel

**SATISFACTION GUARANTEED**
**toll free • 24 hours • 7 days**
**1-800-365-0000**
ALL MAJOR CREDIT CARDS ACCEPTED

2 dosages (10 tablets) $19.99
12 dosages (60 tablets) $99.99
18 dosages (90 tablets) $149.99
40 dosages (200 tablets) $299.99
add $10 for shipping & handling,
all packages shipped federal express next day air.

Send Check or Money Order to:
**Global World Media Corporation**
PO Box = 16442 Beverly Hills
California 90209-2442
Distribution and wholesale inquiries
FAX (310) 581-4456

EXHIBIT B

ecstasy®

**the world's first organic ecstacy (m.d.m.a.) alternative**

From Tokyo to South Africa to the United Kingdom to Argentina, with over 2 million units sold in over 15 countries, a product known as herbal ecstacy® is revolutionizing the way the world thinks of designer drugs.

Using 9 exotic botanicals imported exclusively for this product, herbal ecstacy® has been carefully formulated to produce a considerable range of pleasurable effects.

"Reported effects last 4-8 Hours:

- euphoria
- tingly skin sensations
- highly increased energy levels
- increased sexual sensations
- mood elevation

(a mild serotonin inhibitor)"

Dr. Janis Burton
New Psychology Magazine
Paris, France

"Developed by many of the same doctors who created the chemical version, herbal ecstacy® is 100% natural & absolutely safe. herbal ecstacy® contains no chemicals or other impurities. This product is synergistically blended in order to maximize benefits and eliminate any possible side effects."

Dr. Steven Jonson
Tel Aviv, Israel

**MONEY BACK GUARANTEE**

**toll free • 24 hours • 7 days**

**1-800-365-0000**

2 doses (10 tablets) $19.99
10 doses (50 tablets) $69.99
20 doses (100 tablets) $99.99
add $8 for postage and handling
add $10 for next day air
Send Check or Money Order to:

GWM CORPORATION

Global World Media Corporation
PO Box [illegible] 6442 Beverly Hills
California 90209-2442
[illegible] wholesale inquiries
FAX (310) 581-4456

EXHIBIT C

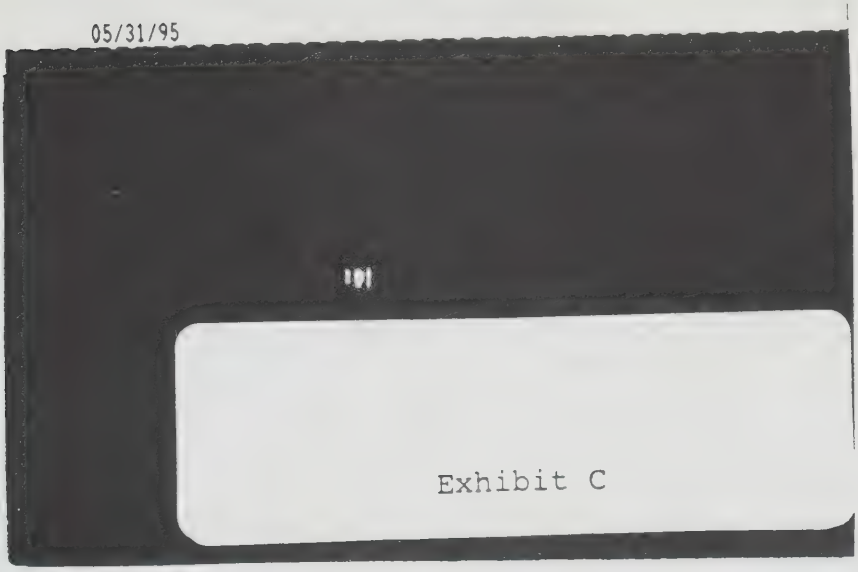
LIGHTNING DUBBS

953 N. HIGHLAND AVE. • HOLLYWOOD, CA 90038 • (213) 957-9255 • FAX (213) 957-9703
1831 CENTINELA AVE. • SANTA MONICA, CA 90404 • (310) 453-3777 • FAX (310) 453-7818
3723 W. OLIVE AVE. • BURBANK, CA 91505 • (818) 556-2777 • FAX (818) 556-2770

GLOBAL WORLD MEDIA CORP.
(310) 581-4450

"HERBAL ECSTACY" #1 Ready For This
DIRECTOR: JON ALLOWAY
3 X :30 GENERIC/TEXT/TEXT FED EX
PLEASE HAVE A NICE DAY!

05/31/95



# EXHIBIT C

## TRANSCRIPT OF TELEVISION AD
"READY FOR THIS"

[Closeup of an eye; a small letter "e" appears in the pupil; switch to a shot of a group of young people standing around a spokeswoman.]

VOICE OVER: Are you ready for this?

GROUP: Yeah!

SPOKESWOMAN: Introducing Herbal Ecstacy.

[Various shots of young people dancing, playing drums, embracing.]

SPOKESWOMAN: The world's first organic designer experience. A sacred blend of nine exotic herbs that produce a considerable range of pleasurable effects.

[SUPERSCRIPT: Satisfaction Guaranteed]

SPOKESWOMAN: Increased energy levels. Euphoric sensations with absolutely no side effects. Synergistically formulated in advanced laboratories around the world by master herbalists. Herbal Ecstacy. The alternative. So call 1-800-365-0000.

[FINAL FRAME: 2 dosages @ $19.95, 10 tablets; $10.00 S&H, Federal Express
SUPERSCRIPT: A PORTION OF PROCEEDS GO TO SAVE THE RAIN FOREST]

EXHIBIT D

RADIO TV REPORTS

41 East 42nd Street New York, NY 10017 (212) 389-1400

| | | |
|---|---|---|
| RADIO COMMERCIAL TRANSCRIPT | | 95R42856GL |
| PROGRAM: MUSIC | 3/09/95 | .60 |
| STATION: KLSX | (LOS ANGELES) | 7:35AM |

## HERBAL ECSTASY

MALE ANNCR.: Are you ready for this? (MUSIC IN B.G.) (SFX. INAUDIBLE SPEAKING) Introducing the world's first organic ecstasy alternative.

WOMAN: Ecstasy.

MALE ANNCR.: Herbal Ecstasy. Reported sensations include euphoria, highly increased energy level, increased sexual feelings with floating, mood lifting effects.

WOMAN: Ecstasy.

MALE ANNCR.: Carefully formulated by the world's most advanced laboratories using rare varieties of nine plants imported exclusively for this product.

MAN: Herbal Ecstasy.

MALE ANNCR.: Users reported keeping a clear head and a sense of heightened perception all night long with no side effects what so ever. So try the alternative, try Herbal Ecstasy Comes complete with a money back guarantee. To order, call toll free, 1-800-365-0000.

MAN: Herbal Ecstasy.

MALE ANNCR.: The world's first organic ecstasy alternative, 1-800-365-0000.

(MUSIC OUT)

Exhibit D

While Radio TV Reports endeavors to assure the accuracy of material supplied by it, it cannot be responsible for mistakes or omissions.
Material supplied by Radio TV Reports may be used for file and reference purposes only. It may not be reproduced, sold or publicly demonstrated or exhibited.

EXHIBIT E

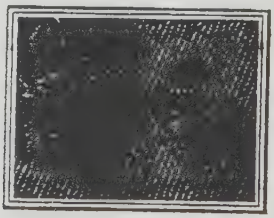
03/29/96 FRI 16:26 FAX 012
Ecstasy
http://www.amaquare.com/pjs/ecstasy.ht

# Herbal Ecstasy

(Click on the icon to add an item to your shopping bag.)

Soar into ecstacy™

The world's most advanced designer nutritional supplement herbal ecstacy™ is more than just another smart drug. it is a carefully formulated and thoroughly tested organic alternative.



$19.95 Per Card, 2 doses per card.

"A 100% natural, tingly & floaty mind expanding euphoria" Obleo Carson, Mind Research Institute (Canada)

"A fantastically light headed, tingly happy, happy buzz, with no side effects." Herb Garden Magazine, UK.

"The effects of herbal ecstasy ™ beyond smart drug capacity include:

= euphoric stimulation
= highly increased energy levels

EXHIBIT E

EXHIBIT E



- tingly skin sensations
- enhanced sensory processing
- increased sexual sensations
- mood elevations

Dr. Janis Burton New Psychology Magazine

We make no health claims, or otherwise whatsoever. All data provided is for historical reasons only. This product is sold strictly as a nutritional supplement, and is in strict compliance with FDA regulations

**100% natural No Preservatives, Additives Or Other Impurities.**

NAAFS NATIONAL ASSOCIATION OF ADVANCED FOOD SUPPLEMENTS

stamp of approval

---

Push this button to in your shopping bag.

Push this button to and place your order.

Push this button for on using the shopping bag.

Back

EXHIBIT F

03/29/96 FRI 16:28 FAX 016

http://www.onramp.net:80/dragons/

ecstacy.

*The Legal Alternative!*

# beyond smart drugs - *a revolutionary alternative!*

*"A fantastically light headed, tingly happy-happy buzz, with no side effects."*
**Herb Garden Magazine, U.K.**

*"The effects of herbal ecstacy beyond smart drug capacity include:*
*euphoric stimulation*
*highly increased energy levels*
*tingly skin sensations*
*enhanced sensory processing*
*increased sexual sensations*
*mood elevations"*
Dr. Janis Burton - New Psychology Magazine

EXHIBIT F

03/29/96 FRI 16:29 FAX 017

http://www.onramp.net:80/dragons/

*"Herbal Ecstacy acts on the same basis as MDMA, triggering similar, but not identical, physical reactions in the body."*
**Peter Noah - URB Magazine**

*"People reported all kinds of effects. Some even saying that it was the best ecstacy experience they'd ever had."*
**Nicholas Saunders U.K. - E for Ecstacy 1992**

## *Hear what Shannon has to say about herbal ecstacy.*

**Click on picture.**

# order now!

## Just $20 plus 2.50 postage and handling

*10 tab pack - sug. dose 5 tabs.*

To order by mail, send money order or check to:

EXHIBIT F

03/29/96 FRI 16:29 FAX 018

http://www.onramp.net.80/dragons/

ADDvantage Plus Expreiences
P.O.Box 89307
Sioux Falls, SD 57105

**synergy** - *the secret of our success!*

**Using an ancient extraction methods all herbs are first extracted separately. Next they are blended together synergistically. Finally, using the world´s most technologically advanced equipment the herbs are once again extracted to produce herbal ecstacy´s unique effect.**

# organic sensations

# a herbal dietary supplement

**amino acids**

**This powerful blend contains all eighteen amino acids in complete form.**

**antioxidants**

**Helps prevent free-radical damage to cells. If left unchecked, these highly reactive molecules attack the cellular walls and may cause damage.**

**thermogens**

Rare forms of popular herbs are synergistically blend to create the most powerful thermogenic compound available today. Burns calories through heat generation.

EXHIBIT F

03/29/96 FRI 16:29 FAX 019

http://www.onramp.net:80/dragons/x

metabolizers
Increases metabolism. Burns calories and maintains lean mass.

vegetarian
No animal products are used whatsoever.

100% natural
NO PRESERVATIVES, ADDITIVES OR OTHER IMPURITIES

# order now!

# Just $20 plus 2.50 postage and handling

*10 tab pack - sug. dose 5 tabs*

To order by mail, send money order or check to:
ADDvantage Plus Expreiences
P.O. Box 89307
Sioux Falls, DS 57105

Site designed by Dragons

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Global World Media Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1501 Main Street in the City of Venice, State of California.

Respondent Sean Shayan is an officer of said corporation. He formulates, directs and control the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. *"Clearly and prominently"* shall mean as follows:

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement or in telephone conversations the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print advertisement, the disclosure shall be in a type size and in a location that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multi-page documents, the disclosure shall appear on the cover or the first page.

D. In an advertisement on any electronic media received by consumers via computer, such as the Internet's World Wide Web or commercial online computer services, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see it and read it, in print that contrasts with the background against which it appears. In multi-screen documents, the disclosure shall appear on the first screen and on any screen containing ordering information.

E. On a product label, the disclosure shall be in a type size, and in a location on the principal display panel, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. Unless otherwise specified, *"respondents"* shall mean Global World Media Corporation, its successors and assigns and its officers; Sean Shayan, individually and as an officer of the corporation; and each of the above's agents, representatives and employees.

4. *"Ephedrine product(s)"* shall mean foods, drugs, dietary supplements, or other products intended for internal use containing a source of any ephedrine alkaloid, including but not limited to ephedrine, pseudoephedrine, norephedrine, norpseudoephedrine, N-methylephedrine, and N-methylpseudoephedrine, either derived from natural sources such as Ephedra sinica (also called Ma-Huang or Chinese Ephedra) or synthetically produced.

5. *"Purchaser for resale"* shall mean any purchaser of any ephedrine product(s) sold by respondents (a) who is a distributor or operates a wholesale or retail business selling any such product(s) or (b) who orders one hundred (100) or more tablets, doses, or other units of any such product(s) in any three (3) month period.

6. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

*It is ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ecstacy or Herbal Ecstacy tablets or any other food, drug, or dietary supplement in or affecting commerce, shall not:

A. Represent in any manner, expressly or by implication, that the use of such product is safe or will cause no side effects; or

B. Make any other representation, in any manner, expressly or by implication, about the safety or side effects of such product, unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale,

sale, or distribution of Ecstacy or Herbal Ecstacy tablets or any other ephedrine product that is not a "drug" as defined by the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321 as amended, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that it is appropriate for users to take such product in an amount that contains ephedrine alkaloids or any other ingredient in excess of any level for such ingredient in a dietary supplement as may be established by the Food and Drug Administration (FDA) under any applicable rule or regulation.

III.

*It is further ordered*, That respondents shall make the following disclosure, clearly and prominently, in any advertisement, promotional material, package label, and package insert for Ecstacy or Herbal Ecstacy tablets or any other ephedrine product, and in any discussion relating to dosage or use of any such product that results from a communication via electronic mail or from any call made by or on behalf of respondents or received on their toll-free, pay-per-call number, or other telephone lines.

WARNING: This product contains ephedrine which can have dangerous effects on the central nervous system and heart and could result in serious injury. Risk of injury increases with dose.

Provided, however, if the product is subject to any FDA rule or regulation that requires a warning or a disclosure about safety or health effects for labeling, such warning or disclosure shall be required in lieu of the disclosure set forth above.

IV.

*It is further ordered*, That respondents shall not provide the means and instrumentalities to, or otherwise assist, any person who respondents know or have reason to know is making any false or misleading representation or deceptive material omission in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Ecstacy or Herbal Ecstacy tablets or any other ephedrine product. "Assist" includes, but is not limited to, selling Ecstacy or Herbal Ecstacy tablets or any other ephedrine product to that person.

V.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce shall not misrepresent that any testimonial or endorsement of the product reflects the actual experience and current opinions, findings, beliefs, or experiences of the testimonialist or endorser.

VI.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ecstacy or Herbal Ecstacy tablets or any other ephedrine product marketed as an alternative to an illegal drug or for its euphoric, psychotropic, or sexual effects, including through the use of the name Ecstacy, Herbal Ecstacy, or Ecstasy, shall not disseminate or employ for any such product advertising, marketing, or other promotional activities directed to individuals under the age of twenty-one (21) years.

For purposes of this Part, "advertising, marketing, or other promotional activity directed to individuals under the age of twenty-one (21) years" shall include, but not be limited to:

A. Advertisements appearing in publications whose readers younger than twenty-one (21) years of age constitute fifty percent (50%) or more of the total readership;

B. Advertisements appearing during or immediately adjacent to television programs seen by audiences whose viewers younger than twenty-one (21) years of age constitute fifty percent (50%) or more of total viewers;

C. Advertisements appearing on a television or radio station or channel at a time when its viewers or listeners younger than twenty-one (21) years of age constitute fifty percent (50%) or more of total viewers or listeners;

D. Advertisements appearing on the same video as a commercially prepared video whose viewers younger than twenty-one (21) years of age constitute fifty percent (50%) or more of total viewers; or preceding a movie whose viewers younger than

twenty-one (21) years of age constitute fifty percent (50%) or more of total viewers;

E. Advertising or promotional activity at events such as concerts that are attended by audiences whose members younger than twenty-one (21) years of age constitute fifty percent (50%) or more of the total audience; or

F. Advertising, marketing, or other promotional activity, regardless of when or where it appears, is disseminated, or takes place, whose audience members younger than twenty-one (21) years of age constitute fifty percent (50%) or more of the total audience.

VII.

*It is further ordered*, That respondent Global World Media Corporation, and its successors and assigns, and respondent Sean Shayan shall submit an analysis, performed by an independent laboratory, of the level of ephedrine alkaloids (including ephedrine, pseudoephedrine, norephedrine, norpseudoephedrine, N-methyl-ephedrine, and N-methylpseudoephedrine) in Ecstacy or Herbal Ecstacy tablets and any other ephedrine product sold by them within sixty (60) days of service of this order, and for the next five (5) years, once annually during the month of the first submission required by this Part.

VIII.

Nothing in this order shall be construed as permitting respondents to market any ephedrine product:

A. In a state where the sale of such products has been banned;

B. In a manner that is inconsistent with any applicable state restrictions on their sale; or

C. In a manner that is inconsistent with any applicable FDA rule or regulation.

IX.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

X.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

XI.

*It is further ordered*, That respondent Global World Media Corporation, and its successors and assigns, and respondent Sean Shayan shall:

A. Send by first class certified mail or deliver in person, an exact copy of the notice attached hereto as Attachment A, without any other accompanying material, to each person who makes or answers calls on respondents' toll-free, pay-per-call number, or other telephone lines maintained for providing information about Ecstacy or Herbal Ecstacy or any other ephedrine product and each person who provides such information via electronic mail. Persons presently making or answering such calls and electronic mail shall be sent the notice within thirty (30) days after the date of service of this order. Persons retained in the future to make or answer such calls and electronic mail shall be given the notice prior to being permitted to make or answer any such calls;

B. Notify any person who fails to return the signed statement included in Attachment A within seven (7) days of receipt that they will be terminated in the event that they fail to return the signed statement;

C. Terminate any person who receives the notification required by subpart B and fails to return the signed statement within seven (7) days of receipt of the notification, and terminate immediately any person who fails to comply with the provisions of the notice attached hereto as Attachment A; and

D. Institute a reasonable program of continuing surveillance adequate to reveal whether each person who makes or answers calls received on respondents' toll-free, pay-per-call number, or other telephone lines maintained for inquires about Ecstacy or Herbal Ecstacy or any other ephedrine product, and each person who provides information about such products via electronic mail, is conforming to the requirements of this order.

XII.

*It is further ordered*, That respondent Global World Media Corporation, and its successors and assigns, and respondent Sean Shayan shall for five (5) years after the receipt of the last correspondence required by Part XI above, maintain and upon request make available for the Federal Trade Commission for inspection and copying:

A. Copies of all notices sent to any person pursuant to subpart A of Part XI of this order; and

B. Copies of all communications with any person who receives the notification required by subpart B or is terminated pursuant to subpart C of Part XI of this order.

XIII.

*It is further ordered*, That respondent Global World Media Corporation, and its successors and assigns, and Sean Shayan shall:

A. Send an exact copy of the notice attached hereto as Attachment B by first class certified mail, return receipt requested within thirty (30) days after the date of service of this order, to any purchaser for resale on or after January 1, 1993. The mailing shall include no other document;

B. For a period of three (3) years following the date of service of this order, send an exact copy of the notice attached hereto as Attachment B by first class certified mail, return receipt requested, to any purchaser for resale. The mailing shall include no document other than Attachment B with the exception of an invoice for the purchase of the product, and shall be made prior to or simultaneously with the first shipment of the product;

C. In the event respondents receive any information that, subsequent to receipt of Attachment B, any purchaser for resale is using or disseminating advertisements or promotional materials that contain any representation prohibited by this order, respondents shall immediately notify such person that respondents will cease to sell ephedrine products to such person if the prohibited representations continue to be made; and

D. Terminate any purchaser for resale about whom respondents receive any information that such person is continuing to use advertisements or promotional materials that contain any

representation prohibited by this order after receipt of the notice required by subpart C of this Part.

XIV.

*It is further ordered*, That respondent Global World Media Corporation, and its successors and assigns, and respondent Sean Shayan shall for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. Copies of all notification letters sent to persons pursuant to subpart A or B of Part XIII; and

B. Copies of all communications received or sent pursuant to subpart C or D of Part XIII.

XV.

*It is further ordered*, That respondents Global World Media Corporation, and its successors and assigns, and respondent Sean Shayan shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available for the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

XVI.

*It is further ordered*, That respondents Global World Media Corporation, and its successors and assigns, and respondent Sean Shayan shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from

each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XVII.

*It is further ordered*, That Global World Media Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XVIII.

*It is further ordered*, That respondent Sean Shayan, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of (1) the discontinuance of his current business or employment and (2) his affiliation with any new business or employment where such business or employment relates to the manufacturing, advertising, promoting, offering for sale, sale, or distribution of any food, drug, or dietary supplement. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIX.

*It is further ordered*, That respondents Global World Media Corporation, and its successors and assigns, and respondent Sean Shayan shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail that manner and form in which they have complied with this order.

XX.

This order will terminate on October 9, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint;

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of this order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

ATTACHMENT A

TO BE DELIVERED BY CERTIFIED MAIL OR IN PERSON
[To be printed on Global World Media Corporation letterhead]

[date]

Dear [name]:

This letter is to inform you that Global World Media Corporation ("GWMC") recently settled a civil dispute with the Federal Trade Commission ("FTC") regarding certain alleged claims about Ecstacy or Herbal Ecstacy tablets

("Ecstacy"). Although we do not admit the violations alleged in the FTC complaint, we have entered into this settlement with the FTC to avoid litigation. As part of the settlement, we are required to notify our employees and others who make or receive calls about Ecstacy, or other ephedrine-containing products sold by GWMC, to stop making certain statements prohibited by the order and to notify the caller of the potentially serious health risks associated with taking these products.

Effective immediately, you **must** comply with the following requirements when contacting potential purchasers or responding by telephone, in writing, or by any other means to any inquiry about Ecstacy or any other ephedrine-containing product sold by GWMC. These products include [list here by product name any ephedrine-containing products other than Ecstacy sold by GWMC as of the date of this notice]:

1. You **must** make the following disclosure in your communications about Ecstacy or any other ephedrine product:

* **"I am required to give you the following important information:**

**WARNING: This product contains ephedrine which can have dangerous effects on the central nervous system and heart and could result in serious injury. Risk of injury increases with dose."**

[In the event any FDA rule or regulation requires a different warning or disclosure in labeling about the health and safety effects of such products, substitute that warning or disclosure here.]

When given orally, this statement must be read prior to any other discussion about the product and in a tone of voice and at a speed that will permit the caller to hear the disclosure and understand the seriousness of the warning. When included in any written communication, this statement must be presented clearly and prominently and before any other information about the product. You must **not** make any statement or other suggestion that could contradict this statement.

2. You must **not** make any statement or other suggestion about the number of tablets that users can take, other than to repeat the dose information on the product label.

Under the FTC order, we are required to get a signed statement from you that you have read this letter and intend to comply with its requirements. Accordingly, you must sign and return the following statement to us.

**Failure to sign and return the attached statement promptly or to comply with the provisions of this letter will result in your termination.**

Your cooperation in complying with this letter is appreciated. If you have any questions, please contact William H. Dailey at (310) 458-0810 [in the event that he no longer represents GWMC, the name and telephone number of the acting attorney, or if none, an officer of GWMC, may be substituted].

Sincerely,

Sean Shayan
President

Global World Media Corporation

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[perforation for tear-away statement]

I have read this letter and understand it and will keep a copy to refer to when answering consumer calls. In the future I intend to comply with the provisions of the letter. I understand that the failure to do so will result in my termination.

_____

[recipient's name] [date]

ATTACHMENT B

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED
[to be printed on Global World Media Corporation letterhead]

[date]

Dear [name]

This letter is to inform you that Global World Media Corporation ("GWMC") recently settled a civil dispute with the Federal Trade Commission ("FTC") regarding certain alleged claims about Ecstacy or Herbal Ecstacy tablets ("Ecstacy"). Although we do not admit to the violations alleged in the FTC complaint, we have entered into this settlement with the FTC to avoid litigation. As part of the settlement, we are required to notify anyone who purchases for resale Ecstacy or other ephedrine-containing products sold by GWMC, including [list any ephedrine-containing products sold by GWMC as of the date of this letter], to stop using advertising or promotional materials that make any of the representations prohibited by the settlement.

Allegations of the FTC Complaint

The FTC complaint alleges that GWMC claimed that the use of Ecstacy in the recommended doses or other reasonably foreseeable amounts is absolutely safe and will cause no side effects. The complaint challenges these claims as false and unsubstantiated, noting that the use of products that contain ephedrine alkaloids, such as Ecstacy, can have dangerous effects on the central nervous system and heart. The complaint also charges that GWMC's advertising for Ecstacy included false endorsements from fictitious persons, including Dr. Steven Jonson.

FTC Order Provisions

The order we entered into as part of our settlement with the FTC requires us to comply with the following provisions:

1. We are prohibited from making claims in advertising, labeling and other promotions for Ecstacy, or any other food, drug or dietary supplement, that such product is absolutely safe or causes no side effects, or from making any other claim about the product's safety or lack of side effects, unless the claim is true and we have competent and reliable scientific evidence to support it.

2. We are prohibited in advertising, labeling, and other promotions for Ecstacy or other products we sell that contain ephedrine, including those listed above, from recommending a dose that exceeds the maximum level for ephedrine as established by FDA for dietary supplements [insert FDA standard as of the date of this letter].

3. We are prohibited in advertising, labeling, and other promotions for any product from representing falsely that any testimonial or endorsement of the product reflects the actual experience and current opinions, findings, beliefs or experiences of the testimonial or endorser.

4. We are required in all advertising, labeling, and other promotions for Ecstacy and other ephedrine-containing products to make the following disclosure clearly and prominently:

WARNING: This product contains ephedrine which can have dangerous effects on the central nervous system and heart and could result in serious injury. Risk of injury increases with dose.

[In the event any FDA rule or regulation requires a different warning or disclosure in labeling, about safety or health effects of such products, substitute that warning or disclosure here.]

5. Finally, we are prohibited from marketing Ecstacy or any other ephedrine-containing product for its euphoric, psychotropic, or sexual effects, through any advertising, marketing, or other promotions directed at an audience with 50% or more of its members under the age of twenty-one.

As part of our settlement with the FTC, GWMC must take steps (such as sending you this letter) to ensure that people who purchase for resale Ecstacy or other ephedrine-containing products sold by GWMC stop using any advertising or promotional materials that do not fully comply with the requirements described above. If you continue to use materials that do not fully comply with such requirements, we are required by the settlement with the FTC to stop selling Ecstacy and other ephedrine-containing products to you.

Thank you for your assistance. If you have any questions, please contact William H. Dailey at (310) 458-0810 [in the event that he no longer represents GWMC, the name and telephone number of the acting attorney, or if none, an officer of GWMC, may be substituted].

Sincerely,

Sean Shayan
President
Global World Media Corporation

IN THE MATTER OF

# AUTOMATIC DATA PROCESSING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9282. Complaint, Nov. 13, 1996--Decision, Oct. 20, 1997*

This consent order requires, among other things, Automatic Data Processing, Inc. ("ADP"), the New Jersey salvage-yard parts trading information network, to divest the former AutoInfo assets as an ongoing business, to grant the acquirer a paid-up, perpetual, non-exclusive license to the "Hollander Interchange" (the cross- indexed numbering system of interchangeable auto parts) and to provide updates to the Hollander Interchange until the acquirer can create its own updates. The consent order also requires ADP, for one year after divestiture, to allow the acquirer to draw on ADP's technical assistance, and to allow certain contractual customers to switch to the acquirer's product without penalty. In addition, the consent order prohibits ADP from restricting its employees from accepting employment with the acquirer and, for 10 years, prohibits it from restricting its customers' ability to connect to and receive or transmit inventory data through the acquirer's products and requires it to provide information necessary for the acquirer or its licensees to create interfaces with ADP's products. Finally, for 10 years, the consent order requires ADP to obtain FTC approval before reacquiring any AutoInfo assets and to notify the FTC before acquiring other assets used in salvage-yard management or communications systems.

## *Appearances*

For the Commission: *Howard Morse, Eric Rohlck* and *William Baer.*

For the respondent: *Kevin Arquit, Rogers & Wells,* New York, N.Y. and *Steve Newborn, Roger & Wells*, Washington, D.C.

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Automatic Data Processing, Inc. ("ADP"), a corporation, entered into an agreement with and acquired assets of AutoInfo, Inc. ("AutoInfo"), in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and attempted to monopolize and monopolized markets in violation of Section 5 of the Federal Trade Commission Act, and that a proceeding in respect

thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

RESPONDENT AUTOMATIC DATA PROCESSING, INC.

1. Respondent Automatic Data Processing, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at One ADP Boulevard, Roseland, New Jersey. ADP, which had total revenues of approximately $3 billion in 1995, provides information services and develops and sells computerized information systems to a variety of industries, including, through its Claims Solutions Group, to automotive salvage yards and insurance companies.

JURISDICTION

2. ADP is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE ACQUISITION

3. Pursuant to a letter of intent entered in December 1994 and an asset purchase agreement dated January 31, 1995, ADP agreed to acquire assets of AutoInfo, a company that, like ADP, provided information services to automotive salvage yards and insurance companies. In 1994, prior to ADP's acquisition of AutoInfo assets, AutoInfo had sales in excess of $20 million. The acquired assets consisted of several business units of AutoInfo described in the January 31, 1995, asset purchase agreement and included all rights to the AutoInfo interchange, the Checkmate Computer Inventory System for salvage yards, the ORION Communications Network, the AutoInfo Locator, a computerized on-line service offered to insurance companies to locate salvage yard parts, and the assumption of the data collector responsibilities for the Automotive Recyclers Association ("ARA") International Database. These assets constituted substantially all of AutoInfo's assets involved in the development and sale of information services and products for the automotive salvage industry.

4. ADP and AutoInfo submitted Premerger Notification and Report Forms to the Federal Trade Commission and Department of

Justice pursuant to the Hart-Scott-Rodino Act ("HSR"), Section 7A of the Clayton Act, 15 U.S.C. 18a, on December 7, 1994. ADP's filing, however, was deficient because it failed to include documents responsive to Item 4(c) of the Premerger Notification and Report Form.

5. ADP consummated the transaction and acquired the AutoInfo assets on or about April 1, 1995 ("Acquisition").

6. ADP recertified its filing in January 1996, when it submitted a corrected filing with numerous documents responsive to Item 4(c). The withheld Item 4(c) documents demonstrated, among other things, that there was an anticompetitive intent underlying the proposed acquisition, that the proposed acquisition would create serious competitive concerns, and that ADP believed that the Acquisition would give ADP a monopoly or virtual monopoly in several product markets.

7. Had ADP submitted the required Item 4(c) documents in a timely manner, the Federal Trade Commission likely would have issued a Request for Additional Information and Documentary Material, as authorized under the HSR Act, 15 U.S.C. 18a(e)(1), and could have sought an injunction to prevent consummation of the Acquisition.

8. On April 10, 1996, the United States District Court for the District of Columbia ordered ADP to pay $2.97 million in civil penalties pursuant to a complaint and stipulation in settlement of civil penalty liability claims by the United States against ADP under Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1).

## THE SALVAGE INDUSTRY

9. Salvage yards use the ADP and former-AutoInfo products in buying and selling used parts and parts-assemblies for automobiles and small trucks. Salvage yards obtain used parts by purchasing wrecked vehicles and dismantling the purchased wrecks into discrete parts or aggregations of parts called parts-assemblies. Salvage yards sell used parts and parts-assemblies (hereafter collectively referred to as "parts") to automotive repair shops, "do-it-yourself" consumers, other salvage yards, and other customers.

10. Salvage yards use computerized information systems to help them with buying and selling parts. Computerized information systems automate the process of managing inventories of parts and the process of making exchange sales with other salvage yards. Computer hardware and software are used, among other things, to

compile records on parts in stock, to locate requested parts in yard facilities, to prepare invoices and customer records, and to compile reports on sales activity. In addition, these computer systems are linked to electronic communications networks that enable yards to search for parts in the inventories of yards linked together on the network. Combined, these functions enabled by computerized information systems increase efficiency, lower costs, and increase sales volume for yards that use them.

11. One of the principal inventory-management functions -- locating requested parts in stock -- is facilitated within computerized information systems by an automobile and truck parts interchange, a numbering system that is unique to the salvage industry ("interchange"). An interchange is the product of a compilation of data about parts interchangeability cross-indexed by a numbering system, which provides a convention or code for assigning numbers to parts so as to identify groups of parts that are interchangeable. Automobile manufacturers ("OEMs") design and manufacture parts to be used across several models and over a number of years; hence, parts in a given vehicle share identical or virtually identical designs with parts of at least some other models and years. A number in the interchange represents a unique identifier for a class of parts that can be substituted for each other (*i.e.*, make a perfect or near-perfect fit when used as a replacement part). This coding system allows salvage yards to substitute parts built for a given model and year of a vehicle with interchangeable parts built for different models and years.

12. Extensive research and time is necessary to create a useful interchange because there are thousands of parts in a car or truck, numerous models from each manufacturer, a number of years of models with parts that are interchangeable -- yet a different range for each model and each part -- and a number of manufacturers. With each new model every year, OEMs often will use a unique OEM number for each individual part, regardless of the individual part's interchangeability.

13. Using an interchange, salvage yard personnel will be able to know whether they can satisfy a customer's request for a replacement part from the yard's inventory of parts even if they do not have a part from the exact model and year of the damaged vehicle. In this way, use of an interchange enables yards to increase their sales by identifying interchangeable parts for customer requests, which effectively expands their inventories.

14. Many salvage yards use a computerized inventory-control and database system called a yard management system, which employs an electronic version of the interchange. The interchange is built into the inventory database and designed to interact with it to automate the process of finding parts in stock. The salesperson can type in a part description, and the computer's internal database, utilizing the interchange in electronic form, will bring up a display on the computer monitor of the interchangeable parts that are in stock, along with their location in the storage facility.

15. Using an electronic communications network that is directly linked to its yard management system, a salvage yard can also automatically locate interchangeable parts in the inventories of other salvage yards that use the same yard management system and are linked to the same electronic network. The provider of the computerized information system creates a central inventory database pooling the inventory of the yard management systems customers. This central database can be searched by yards using the yard management system and the electronic network hook-up that transmits the search requests to the database and the search results back to the yard management system. These search results are displayed on the computer screen (and can be printed out in hard-copy) like searches done within the yard's own inventory. As with searches performed in-house, searches of the central database utilize the electronic interchange to locate interchangeable parts in other yards' inventories.

## THE RELEVANT MARKETS

### *Salvage Yard Information Systems Market*

16. A relevant line of commerce in which to assess the effects of the Acquisition is the integrated group of information products and services that form the complete salvage yard information systems network, consisting of an interchange integrated with yard management systems and electronic communications systems, described in paragraphs nine-fifteen and incorporated herein.

17. At the time of the Acquisition, ADP sold as a salvage yard information system the Hollander interchange, the Hollander Yard Management System ("HYMS"), and the Electronic Data Exchange Network ("EDEN"), an electronic communication network. ADP competed with AutoInfo, which sold a system that combined the AutoInfo interchange, the AutoInfo yard management system (available in different versions called "Classic," "Checkmate," and

"Checkmate Jr."), and ORION/RTS electronic communication network. ADP and AutoInfo, as well as salvage yards and fringe competitors, recognize that prior to the Acquisition, ADP and AutoInfo were fierce competitors and the only competitors offering integrated systems. ADP and AutoInfo competed for new and existing customers to whom they could sell and service salvage yard information systems.

18. There are no economic substitutes for the integrated group of products that makes up the salvage yard information systems market.

19. In addition to the salvage yard information systems market, each of the individual components constituting the salvage yard information systems market, described below, may be sold in separate lines of commerce that can be analyzed for purposes of determining the effects of the Acquisition.

*Interchange Market*

20. Another relevant line of commerce in which to analyze the effects of the Acquisition is the development and sale of automotive parts and assemblies interchanges.

21. There are no economic substitutes for an interchange. Automobile manufacturers do not make public data on parts interchangeability and do not provide a cross-indexing system to parts numbers between models or model years.

22. Before the Acquisition, ADP owned the Hollander Interchange, one of only two interchanges used by the salvage industry. AutoInfo owned the AutoInfo Interchange, the only other interchange used by the salvage industry.

*Salvage Yard Management Systems Market*

23. Another relevant line of commerce in which to analyze the effects of the Acquisition is the development and sale of yard management systems integrated with interchange.

24. ADP sells its yard management system under the name Hollander Yard Management System and HYMS Lite. The HYMS and HYMS Lite products integrated the Hollander Interchange. Prior to the Acquisition, AutoInfo sold yard management systems called "Checkmate," "Checkmate Jr." and "Classic." AutoInfo's yard management systems integrated the AutoInfo Interchange. After the Acquisition, ADP announced that it would not sell Checkmate, Checkmate Jr. or Classic for new installations, and has not sold any new units of these products.

*Electronic Communications Systems Market*

25. Another relevant line of commerce in which to assess the effects of the Acquisition is the development and sale of electronic communications systems used by salvage yards to locate parts through searches of a central database of parts.

26. Other communications methods, such as the use of either ordinary public-switched telephone service and leased open party lines, often referred to as "hoot 'n holler" lines, are not effective substitutes for the electronic communication systems.

27. ADP sells a fee-based service using an electronic network called EDEN. Customers can use EDEN to link their HYMS yard management system into a central database, maintained by ADP, which is linked to other HYMS units that utilize EDEN. Prior to the Acquisition, AutoInfo sold a fee-based service using an electronic network called ORION/RTS. Customers used ORION/RTS to link their Checkmate yard management system into a central database, which was linked to other Checkmate units that utilized ORION. These electronic communications services can be used as standalone products by salvage yards that want access to the central database of available parts and assemblies to locate parts but that do not contribute their inventory data to the central database, and thus cannot sell parts through the electronic communications system.

*Salvage Yard Inventory Data for Estimates Market*

28. Another relevant line of commerce in which to assess the effects of the Acquisition is the collection and provision of salvage yard inventory data to customers who provide such data as a part of estimating products sold to insurance companies.

29. Insurance companies use estimating software products developed and sold by companies such as ADP, CCC Information Services and Mitchell International to assist in determining the cost to repair a damaged automobile ("Estimating Software Providers"). The estimate includes necessary parts and the required labor time. The estimating software can include a function that reveals the availability and price of salvage parts for use in the auto repair. The Estimating Software Providers acquire the salvage yard inventory data from databases that collect the data from the salvage yards' yard management systems. This salvage yard inventory data information is provided in electronic form to the Estimating Software Providers.

30. ADP provides data on available salvage parts through its Parts Exchange Salvage ("PXS") service. PXS is utilized by insurance

companies that use ADP's estimate-preparing software. Prior to the Acquisition, AutoInfo -- under a contract with the Automotive Recyclers Association -- collected and provided salvage part inventory data to Estimating Software Providers through the ARA International Database. Since the Acquisition, ADP has collected salvage part data for the ARA International Database for use by Estimating Software Providers who compete against ADP.

GEOGRAPHIC MARKET

31. The relevant geographic area in which to assess the effects of the Acquisition is the United States or, alternatively, the United States and Canada.

MARKET STRUCTURE

32. Each of the markets for the relevant products is highly concentrated. ADP is the only supplier of an interchange, the only provider of salvage yard information systems, the dominant provider of yard management systems, with a market share of at least 80%, and the only provider of electronic communications systems that enable parts locating through a central database of parts.

33. ADP's acquisition of AutoInfo assets was part of a plan to acquire the leading information service providers to the salvage industry and thereby acquire market power. By 1992, ADP had formulated a plan of sequential acquisitions of Hollander, Inc. ("Hollander"), a provider of salvage yard information services with the largest customer base, and AutoInfo, which had the second largest customer base. ADP acquired Hollander in 1992. Acquiring both companies in sequence was a part of ADP's strategy to control the computerized salvage yards in the industry and the suppliers of the computerized systems.

34. ADP's principal and only significant competitor in the relevant product markets prior to the Acquisition was AutoInfo. AutoInfo produced the only other interchange used by salvage yards and the only other yard management system with an integrated electronic interchange. AutoInfo also produced the only other electronic communications network that enables parts locating through a central database. AutoInfo was the only other firm that provided a comparable integrated information system. Prior to the Acquisition, AutoInfo was also the only competitor to ADP in providing a comprehensive database of salvage parts collected

electronically from yard management systems and electronic networks.

35. There are three other extremely small yard management system suppliers, each of which is dependent upon a restrictive license from ADP for use of the Hollander Interchange.

36. Prior to the Acquisition, ADP and AutoInfo were vigorous, head-to-head competitors in the relevant product markets.

37. The closeness of competition between ADP and AutoInfo was also reflected in innovation competition. ADP and AutoInfo competed vigorously to provide communications capabilities to complement their respective yard management systems. ADP responded to AutoInfo's ORION network, originally capable only of transmitting text-messages, by developing the EDEN electronic network, which allowed direct connection between the HYMS yard management system and a centralized parts inventory database. AutoInfo's response to EDEN, as a competitive challenge to ORION, was to improve ORION by augmenting it with a system similar to EDEN for use by customers of the AutoInfo yard management system.

38. After the Acquisition, ADP now owns the principal and, in some cases, the only products in the relevant markets.

ENTRY CONDITIONS

39. Entry into the relevant product markets would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects of the Acquisition. ADP's interchange is protected by copyright and is based on a database that took many years to develop and would be difficult and time-consuming to attempt to reproduce. The interchange is also the key input into yard management systems and electronic communication systems and without entry into the interchange market, it is also unlikely that timely or sufficient entry will occur into these other product markets. It is also unlikely that timely or sufficient entry will occur in the collection and dissemination of salvage yard inventory data largely because of the time, expense and difficulty in collecting that salvage yard inventory data independently of ADP and because ADP is the gatekeeper of the salvage yard inventory data through its control of the interchange, integrated yard management systems, electronic communications systems and salvage yard information systems.

40. Entry into the market for yard management systems and electronic communications networks or, alternatively, into the salvage yard information systems market is also difficult, time-consuming, and unlikely because of the large number of customers ADP currently has using these products and services. Yard management systems and electronic communication systems are used to create a network for buying and selling used parts, and salvage yards are reluctant to rely upon a new entrant without a significant number of other salvage yard customers participating in the network.

ANTICOMPETITIVE EFFECTS OF THE ACQUISITION

41. The Acquisition substantially lessened or may substantially lessen competition in the following ways, among others:

a. It has eliminated AutoInfo as a substantial independent competitor;

b. It has eliminated actual, direct and substantial competition between ADP and AutoInfo;

c. It has increased the level of concentration in the relevant product markets;

d. It has led or may lead to increases in price for the relevant products;

e. It has led or may lead to the reduction in maintenance and service for the relevant products;

f. It has led or may lead to reductions in technological improvement or innovations in the relevant products;

g. It has increased barriers to entry into the relevant markets;

h. It has inconvenienced and caused financial harm to users of AutoInfo's interchange, yard management system, electronic communication system and information system through failure to provide upgrades altogether or to provide upgrades in a timely fashion;

i. It has given ADP market power in the relevant product markets;

j. It has allowed or may allow ADP unilaterally to exercise market power in the relevant product markets, by increasing prices for yard management systems, electronic communications and information systems and by reducing service and innovation competition;

k. It has given ADP monopoly power or a dangerous probability of success in obtaining monopoly power in the relevant product markets.

VIOLATIONS ALLEGED

COUNT I -- ILLEGAL ACQUISITION

42. The allegations contained in paragraphs one through forty-one are repeated and realleged as though fully set forth here.

43. The effect of the Acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

COUNT II -- ILLEGAL ACQUISITION AGREEMENT

44. The allegations contained in paragraphs one through forty-one are repeated and realleged as though fully set forth here.

45. ADP, through the acquisition agreements described in paragraph three, has engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

COUNT III -- ATTEMPT TO MONOPOLIZE

46. The allegations contained in paragraphs one through forty-one are repeated and realleged as though fully set forth here.

47. Through the acquisition of Hollander and the acquisition of AutoInfo assets, ADP has engaged in unfair methods of competition in or affecting commerce by attempting to monopolize the relevant product markets in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

COUNT IV -- MONOPOLIZATION

48. The allegations contained in paragraphs one through forty-one are repeated and realleged as though fully set forth here.

49. Through the acquisition of Hollander and the acquisition of AutoInfo assets, ADP has engaged in unfair methods of competition in or affecting commerce by monopolizing the relevant product markets in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and the respondent having been

served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all of the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(b) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Automatic Data Processing, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at One ADP Boulevard, Roseland, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, and the proceeding is in the public interest.

ORDER

I.

*It is ordered*, That, as used in this order, the following definitions shall apply:

A. *"Respondent"* or *"ADP"* means Automatic Data Processing, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by ADP, and the respective directors,

officers, employees, agents, and representatives, successors, and assigns of each.

B. *"Parts Services"* means the Parts Services Division of ADP Claims Solutions Group, Inc., a subsidiary of ADP.

C. *"Commission"* means the Federal Trade Commission.

D. *"Acquisition"* means the April 1, 1995, acquisition by ADP of assets from AutoInfo, Inc., including salvage yard management systems, communications systems and networks, automotive interchange, inventory data collection contracts and other assets.

E. The *"AutoInfo Assets"* means the AutoInfo Interchange, the AutoInfo YMS, the AutoInfo Communication Systems, AutoInfo Parts Locator and the ARA Database Collector, and a non-exclusive, paid-up license to all research and development, by or for Parts Services, since April 1, 1995, through the date of divestiture for any new yard management system or communication system.

F. The *"Hollander Interchange"* means the numeric indexing system developed, maintained and sold or licensed originally by Hollander, Inc. and subsequently by ADP and used to identify automotive parts and assemblies and their ability to be interchanged and includes all updates prepared by or for ADP up to the date of divestiture pursuant to paragraph II or paragraph III of this order, including but not limited to any interchange developed or updated by ADP since the Acquisition from then-existing Hollander Interchange and AutoInfo Interchange data.

G. The *"AutoInfo Interchange"* means the numeric indexing system owned by ADP, but previously developed, maintained and sold by AutoInfo, used to identify automotive parts and assemblies and their ability to be interchanged and includes all updates to the AutoInfo Interchange prepared by or for AutoInfo up to the date of the Acquisition or by or for ADP up to the date of divestiture pursuant to paragraph II or paragraph III of this order, and includes supplier and service contracts, research and development, and other tangible and intangible assets used in the development and maintenance of the AutoInfo Interchange.

H. *"AutoInfo YMS"* means Checkmate, Checkmate Jr., Classic, the BidPad, PartPad, accounting and management modules, and any other salvage yard management systems developed, maintained, sold or licensed by AutoInfo, Inc., and subsequently by ADP, including source codes, application program interfaces, data formats and communication protocols, customer, supplier and service contracts,

goodwill, research and development, and other tangible and intangible assets relating thereto.

I. *"AutoInfo Communication Systems"* means the ORION, ORION/RTS, AutoMatch, AutoXchange, and ORION Exchange communication systems used for the buying and selling of used auto parts and assemblies, including source codes, application program interfaces, data formats and communication protocols, customer, supplier and service contracts, goodwill, research and development and other tangible and intangible assets relating thereto, and respondent's rights and obligations with respect to current and former subscribers to CalQwik.

J. *"ARA"* means the Automotive Recyclers Association.

K. *"ARA Database Agreement"* means the February 27, 1996, "Amended and Restated Agreement Regarding the ARA International Database by and between Automotive Recyclers Association and ADP Claims Solutions Group, Inc." and any addenda thereto.

L. *"ARA Database Collector"* means the rights and obligations to act as the manager and operator of the Automotive Recyclers Association International Database pursuant to the ARA Database Agreement.

M. *"Compass"* means the Compass Communications Network, the group of voice communication, data, and buying networks to the automobile salvage industry formerly owned by AutoInfo, and customer, supplier and service contracts, goodwill, research and development and other tangible and intangible assets used in the development, maintenance, sale or licensing of the Compass communication systems.

N. *"AutoInfo Parts Locator"* means the AutoInfo Parts Locator, a computerized on-line telephone service that is offered to the automobile casualty insurance industry, which uses ORION/RTS, and software that provides access to the ORION/RTS database, customer, supplier and service contracts, customer lists, goodwill, research and development and other tangible and intangible assets used in the development, maintenance, sale or licensing of the AutoInfo Parts Locator.

O. *"HYMS"* means the Hollander Yard Management System, originally developed, maintained and sold or licensed by Hollander, Inc., and subsequently developed, maintained and sold or licensed by ADP.

P. *"EDEN"* means the Electronic Data Exchange Network, a communications and database inventory-search system used by

salvage yards for the buying and selling of used automobile parts and assemblies.

Q. *"Trustee Assets"* means the AutoInfo Assets and Compass.

R. *"Acquirer"* means the acquirer or acquirers of the AutoInfo Assets pursuant to paragraph II or the Trustee Assets pursuant to paragraph III of this order.

II.

A. Respondent shall divest, absolutely and in good faith, (1) within one hundred fifty (150) days after the date the agreement containing consent order is accepted for public comment by the Commission, or (2) within sixty (60) days after the date on which this order becomes final, whichever date is later, the AutoInfo Assets as an on-going business to the Acquirer at the time of divestiture. Respondent shall divest the AutoInfo Assets only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the AutoInfo Assets is to maintain the AutoInfo Assets as on-going businesses, to continue use of the AutoInfo Assets in the same businesses in which the AutoInfo Assets were engaged at the time of the Acquisition in competition with ADP, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

Provided, however, respondent may, in lieu of divesting its rights as the ARA Database Collector to an Acquirer pursuant to this paragraph II.A and in satisfaction of its obligations to divest its rights as the ARA Database Collector under this paragraph II.A, terminate in accordance with all of the provisions specified in the ARA Database Agreement its role as the ARA Database Collector.

Provided, however, respondent shall grant to any entity that becomes the ARA Database Collector, if such entity is not the Acquirer, a royalty-free license to the Hollander Interchange to use solely for purposes of collecting and transmitting data and managing and operating a database for the ARA pursuant to a data collection agreement with the ARA.

Provided, however, respondent may retain a non-exclusive, paid-up license to the AutoInfo Interchange as of the date of the divestiture, excluding supplier and service contracts, research and development, and other tangible and intangible assets used in the development and maintenance of the AutoInfo Interchange.

B. Pending divestiture of the AutoInfo Assets, respondent shall take such actions as are necessary to maintain the viability, competitiveness and marketability of the AutoInfo Assets and the Trustee Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the AutoInfo Assets and the Trustee Assets except for ordinary wear and tear.

C. Respondent shall comply with the terms of the Asset Maintenance Agreement, which is attached hereto and incorporated herein.

III.

*It is further ordered*, That:

A. If respondent has not divested the AutoInfo Assets pursuant to and within the time required by paragraph II.A, the Commission may appoint a trustee to divest the Trustee Assets. The trustee shall have all rights and powers necessary to permit the trustee to effect the divestiture of the Trustee Assets in order to assure the viability, competitiveness, and marketability of the Trustee Assets and to accomplish the remedial purposes of this order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

Provided, however, the trustee may, at his or her option and in satisfaction of his or her obligations under this paragraph III.A, require ADP to terminate its role as the ARA Database Collector pursuant to the ARA Database Agreement.

Provided, however, respondent shall grant to any entity that becomes the ARA Database Collector, if such entity is not the Acquirer, a royalty-free license to the Hollander Interchange to use solely for purposes of collecting and transmitting data and managing and operating a database for the ARA pursuant to a data collection agreement with the ARA.

Provided, however, respondent may retain a non-exclusive, paid-up license to the AutoInfo Interchange as of the date of the divestiture, excluding supplier and service contracts, research and development, and other tangible and intangible assets used in the development and maintenance of the AutoInfo Interchange.

B. If a trustee is appointed by the Commission or a court pursuant to this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after written notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Trustee Assets.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Trustee Assets and to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee.

Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Trustee Assets.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. In the event that the trustee determines that he or she is unable to divest the Trustee Assets in a manner consistent with the Commission's purpose in paragraph II, the trustee may divest additional ancillary assets of respondent related to the Trustee Assets and effect such arrangements as are necessary to satisfy the requirements of the order.

12. The trustee shall have no obligation or authority to operate or maintain the Trustee Assets.

13. The trustee shall report in writing to respondent and the Commission every thirty (30) days concerning the trustee's efforts to accomplish divestiture.

IV.

*It is further ordered*, That respondent shall:

1.Grant to the Acquirer, at the time of the divestiture, a paid-up, perpetual, non-exclusive license, with no continuing royalties and with unlimited rights to sub-license, to the Hollander Interchange and to each update of the Hollander Interchange, including but not limited to α (alpha) and β (beta) releases of any updates, prepared by or for respondent for a period of three (3) years starting at the date of divestiture, or for such longer period and on such terms as may be agreed by the Acquirer and respondent, and the right to use the name "Hollander Interchange" in reference to the Hollander Interchange and updates prepared by or for the respondent pursuant to this paragraph IV.A. Respondent shall provide such updates to the Acquirer no later than when it first provides each such update to its salvage yard customers; and

2.Provide to the Acquirer, at the time of the divestiture, a copy of, and non-exclusive license to, all computer programs and databases, and a list of and sources for all information, used by respondent to update the Hollander Interchange.

Provided, however, respondent may include in the license entered pursuant to this paragraph IV a provision preventing or limiting the Acquirer from reproducing and selling the copyright protected format of respondent's printed, book form of the Hollander Interchange, but respondent shall not otherwise restrict the Acquirer from producing and selling the Hollander Interchange in any form, including in printed, book form.

V.

*It is further ordered*, That respondent shall, for a period of twelve (12) months from the date of the divestiture pursuant to paragraph II or paragraph III of this order, allow, without penalty, any customer who entered into a contract for HYMS or EDEN between April 1, 1995 and the date of divestiture, to switch from HYMS to an AutoInfo YMS or any yard management system licensed or sold by the Acquirer and/or switch from EDEN to the AutoInfo Communication Systems or to any communications systems licensed or sold by the Acquirer.

VI.

*It is further ordered*, That:

A. Respondent shall not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict any person who was employed by respondent in Parts Services, or formerly by AutoInfo, Inc., at any time since January 1, 1995, from working for the Acquirer and shall cooperate with the Acquirer in effecting transfer to the Acquirer of any such employee who chooses to transfer to the Acquirer. Respondent shall not offer any incentive to any such employees to decline employment with the Acquirer or to accept other employment by ADP; and shall remove any non-compete or confidentiality restrictions with respect to employment of such employees by the Acquirer. Respondent shall pay, for the benefit of such employees transferring to the Acquirer, accrued bonuses, vested pensions and other accrued benefits.

Provided, however, respondent may match or exceed the Acquirer's terms for employment offered by the Acquirer to respondent's employees who were not employees of AutoInfo, Inc., as of January 1, 1995.

Provided, however, nothing in this paragraph shall restrict respondent from protecting or asserting respondent's attorney client or work product privileges.

B. For a period of twelve (12) months following the date of divestiture pursuant to paragraph II or paragraph III, upon reasonable notice from the Acquirer, respondent shall provide, at reasonable times and levels, such personnel, information, technical assistance, advice and training to the Acquirer as are necessary to transfer the AutoInfo Assets or the Trustee Assets, as applicable, and to facilitate the Acquirer in developing, maintaining and conducting the AutoInfo Assets as viable, on-going businesses. Such assistance shall include reasonable consultation with knowledgeable employees of ADP to satisfy the Acquirer's management that its personnel are appropriately trained to the extent ADP has the ability to do so after the divestiture is complete. Respondent shall not charge the Acquirer a rate more than its own direct cost for providing such assistance.

C. No later than the date of the execution of a divestiture agreement between respondent and the proposed Acquirer, respondent shall provide the proposed Acquirer with a complete list of all non-clerical employees of ADP who have been involved in the development, production, distribution, or sale of the Hollander Interchange, and of the AutoInfo Assets or of the Trustee Assets at any time during the period from January 1, 1994, until the date of the divestiture agreement. Such list shall state each such individual's name, position, address and telephone number. If the person is no longer employed by respondent, respondent shall provide all such information as it has available.

D. Respondent shall make available to any person, on whose behalf respondent has filed an application to divest, for inspection, the personnel files and other documentation relating to the individuals identified in paragraph VI.C of this order to the extent permissible under applicable laws and with the permission of such individuals. For a period of six (6) months following the divestiture, respondent shall further provide the Acquirer with an opportunity to interview such individuals identified in paragraph VI.C of this order and negotiate employment with any of them.

E. For a period of one (1) year commencing on the date of any individual's employment by the Acquirer pursuant to this paragraph VI, respondent shall not offer employment to such individual, unless such individual is no longer employed by the Acquirer.

VII.

*It is further ordered*, That, for a period of ten (10) years following the date of divestiture, respondent shall not prohibit, prevent or restrict, or threaten to prohibit, prevent, restrict or enforce any contractual arrangements that have the effect of prohibiting, preventing, or restricting any customer or licensee of the Hollander Interchange from accessing, connecting with, or communicating data through, the products of the Acquirer or its licensees, or the ARA Data Collector, including but not limited to the AutoInfo Communication Systems or any communication system licensed or sold by the Acquirer or its licensees, the AutoInfo YMS or any yard management systems licensed or sold by the Acquirer or its licensees, or data collection systems provided by the Acquirer or its licensees. Respondent shall provide to the Acquirer, for use by Acquirer and its licensees, specifications and information reasonably necessary for the Acquirer and its licensees to create interfaces with respondent's yard management and communications systems and a paid-up, perpetual, non-exclusive license to the Acquirer and its licensees to use the Hollander Interchange and future updates of the Hollander Interchange in connection with collecting or searching inventory data.

Provided, however, nothing in this paragraph VII shall require respondent to extend to the Acquirer or its licensees rights to sell or distribute updates of the Hollander Interchange other than the rights specified in paragraphs II or IV.A of this order.

Provided, however, nothing in this paragraph VII shall require respondent to create or modify application program interfaces or to alter respondent's existing products.

Provided, however, nothing in this paragraph VII shall prohibit the respondent from restricting transmission of Hollander Interchange numbers to persons other than the Acquirer or its licensees.

Provided, however, nothing in this paragraph VII shall require respondent to repair any customer's HYMS or EDEN product in the event such product's functionality is damaged by the use of any product of the Acquirer or its licensees.

VIII.

*It is further ordered*, That:

A. For a period of ten (10) years from the date of the divestiture of the AutoInfo Assets or the Trustee Assets, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire all or any part of the AutoInfo Assets, if divested pursuant to paragraph II, or Trustee Assets, if divested pursuant to paragraph III; and

B. For a period of ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission, directly or indirectly:

1. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in the development or sale of yard management systems or communications systems used by automobile salvage yards within the year preceding such acquisition; provided, however, that an acquisition of such stock, share capital, equity or other interest will be exempt from the requirements of this paragraph if it is solely for the purpose of investment and respondent will hold no more than five (5) percent of the shares of any class of security; or

2. Acquire any assets used or previously used (and still suitable for use) in the development or sale of yard management systems or communications systems used by automobile salvage yards provided, however, that such an acquisition will be exempt from the requirements of this paragraph if the purchase price is less than $1,500,000 (one million five hundred thousand dollars).

The prior notifications required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared, transmitted and kept confidential in accordance with the requirements of that part, except that: no filing fee will be required for any such notification; notification shall be filed with the Secretary of the Commission and a copy shall be delivered to the Bureau of Competition; notification need not be made to the United States Department of Justice; and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days

prior to the consummation of any such transaction (hereinafter referred to as the "initial waiting period"). If, within the initial waiting period, the Commission or its staff makes a written request for additional information and documentary material, respondent shall not consummate the transaction until at least twenty (20) days after complying with such request for additional information and documentary material. Early termination of the waiting periods in this paragraph may, where appropriate, be granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Provided, however, that this paragraph VIII shall not apply to the acquisition of products or services in the ordinary course of business.

IX.

*It is further ordered,* That:

A. Within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs II or III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One year (1) from the date of the divestiture of the AutoInfo Assets pursuant to paragraph II or the Trustee Assets pursuant to paragraph III, and annually thereafter until the obligations of paragraph VIII have expired, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs IV, V, VI, VII and VIII of this order.

X.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate structure or status of respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

XI.

*It is further ordered,* That, for the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

XII.

*It is further ordered,* That this order shall terminate on October 20, 2017.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement is by and between Automatic Data Processing, Inc. ("ADF"), a corporation organized and existing under the laws of the State of Delaware, and the Federal Trade Commission, an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* ("Commission").

PREMISES

*Whereas,* ADP acquired certain assets of AutoInfo, Inc. on April 1, 1995 (the "Acquisition");

*Whereas,* ADP has been served with a copy of the complaint issued by the Federal Trade Commission charging it with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S. C. 18, and has filed an answer to said complaint denying said charges;

*Whereas,* if the Commission accepts the Agreement Containing Consent Order ("consent agreement") in this matter, the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance of the consent agreement and so notify ADP, in which event the Commission will take such action as it may consider appropriate, or issue and serve its decision containing the order in the consent agreement, in disposition of the proceeding;

*Whereas,* the Commission is concerned that if an understanding is not reached during the period to the final issuance of the consent agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm relating to the assets and businesses proposed for divestiture;

*Whereas,* ADP understands that no act or transaction contemplated by this Asset Maintenance Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Asset Maintenance Agreement.

*Now, therefore,* ADP agrees, upon the understanding that the Commission has issued an administrative complaint, and in consideration of the Commission's agreement that, from the time it accepts the consent agreement for public comment and pending either the order becoming final or the Commission withdrawing its acceptance of the consent agreement, it will not return this matter to administrative adjudication, as follows:

1. ADP agrees to execute the consent agreement and, pending divestiture of either the AutoInfo Assets or the Trustee Assets, as those terms are defined in the consent agreement, pursuant to paragraph II or paragraph III of the consent agreement, ADP shall take such actions as are necessary to maintain the viability, competitiveness and marketability of the AutoInfo and the Trustee Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the AutoInfo or Trustee Assets except for ordinary wear and tear.

2. ADP agrees that, from the date ADP signs the consent agreement until the first of the dates listed in subparagraphs 2.a and 2.b, it will comply with the provisions of this Asset Maintenance Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the consent agreement pursuant to the provisions of Section 3.25(f) of the Commission's Rules; or

b. The date the order is final.

3. ADP waives all rights to contest the validity of this Asset Maintenance Agreement.

4. For the purpose of determining or securing compliance with this Asset Maintenance Agreement, subject to any legally recognized privilege, and upon written request, and on reasonable notice, ADP shall permit any duly authorized representative or representatives of the Commission:

a. Access, during office hours of ADP and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of ADP relating to compliance with this Asset Maintenance Agreement; and

b. Upon five days' notice to ADP and without restraint or interference from it, to interview officers, directors, or employees of ADP who may have counsel present, regarding any such matters.

5. This Asset Maintenance Agreement shall not be binding until accepted by the Commission.

IN THE MATTER OF

# METAGENICS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9267. Amended Complaint, October 23, 1997--Decision, October 23, 1997*

This consent order, among other things, requires a California-based company and its officer, the marketers of a calcium supplement known as "Bone-Builder," to possess scientific substantiation for any claim that their product or any food, drug or dietary supplement containing calcium will treat or prevent any disease, disorder or condition. The consent order also requires the respondents to possess scientific substantiation for superiority claims for such products and regarding the relationship between calcium and osteoporosis. In addition, the consent order prohibits the respondents from misrepresenting the existence or results of any test or study regarding such products.

## *Appearances*

For the Commission: *Lesley Fair* and *C. Lee Peeler.*

For the respondents: *Robert Ullman, Bass & Ullman,* New York, N.Y.

## AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that Metagenics, Inc., a corporation, doing business as Ethical Nutrients, and Jeffrey Katke, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Metagenics, Inc., doing business as Ethical Nutrients, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office or place of business at 971 Calle Negocio, San Clemente, California.

Respondent Jeffrey Katke is an officer of Metagenics, Inc. Individually or in concert with others, he formulates, directs and controls the acts and practices of the said corporation, including the acts and practices alleged in this complaint. His business address is 971 Calle Negocio, San Clemente, California.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold and distributed an orally-ingested product containing microcrystalline hydroxyapatite ("MCHC"), minerals and protein, under the name Bone Builder (hereinafter "MCHC" or "Bone Builder"). Respondents also offer for sale and sell the MCHC product to other parties who market the product under their own brand names. Bone Builder is a food and/or drug, as the terms "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Bone Builder, including but not necessarily limited to the attached Exhibits A through D. These advertisements and promotional materials contain the following statements:

1. The superior form of calcium proven to build bone. The latest research shows "microcrystalline hydroxyapatite" is the superior form of calcium that can build bone. We call this exciting Ethical Nutrient's [sic] product: BONE BUILDER. (Exhibit A).

2. Some calcium supplements can be worse than not taking anything at all. At best, others may slow bone loss, occasionally stopping it. But, BONE BUILDER can restore lost bone and has the clinical evidence to prove it! (Exhibit A).

3. A significant statement recurs in a number of reports: MCHC either reduces or totally eliminated bone pain, which was not found true of any other substance. (Exhibit A).

4. Only MCHC provides calcium in an "extremely bioavailable form" and the studies on it have "also indicated the superiority of the substance over traditional soluble calcium supplements." Of the substances used for experimentation to halt the progress of osteoporosis, only microcrystalline hydroxyapatite was considered to be totally free of "major potential hazard [sic]," which indicated its use for both "the treatment and prevention of osteoporosis." (Exhibit A).

5. These are just a few of the controlled clinical trials to be found in medical literature. The consensus of which is that microcrystalline hydroxyapatite halted bone loss, decreased pain and increased bone thickness when taken in adequate amounts over long periods of time, a record no calcium supplement could achieve. (Exhibit B).

6. Contains most absorbable kind of calcium. (Exhibit C).

7. BONE BUILDER is pure microcrystalline hydroxyapatite compound (MCHC), a substance which has been scientifically demonstrated to be the most effectively utilized source of calcium known. (Exhibit C).

8. Most importantly, no other product in the United States is as effective at preventing bone loss. (Exhibit C).

9. [R]esearch of the many common forms of calcium used in the trials demonstrated effectively that only one form of calcium was capable of preventing bone thinning and actually restoring bone strength, and that was "whole bone extract (microcrystalline hydroxyapatite concentrate) . . . ." (Exhibit D).

10. Where there is evidence that osteoporosis "runs in the family," and where there is evidence that calcium loss is already taking place, *i.e.* muscle spasms, receding gums, or loss of height, the ability of microcrystal-line hydroxyapatie [sic] (bone) concentrate places prevention as a matter of the individual sufferer's choice. This safe, reliable, inexpensive, scientifically-tested preventive is his/hers to take as they choose . . . . (Exhibit D).

PAR. 5. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through D, respondents have represented, directly or by implication, that:

1. Post-menopausal women who have lost bone and who use Bone Builder or MCHC will experience no additional bone loss or bone thinning and will achieve a growth of new bone and increased bone thickness greater than the amount of bone lost;

2. Users of Bone Builder or MCHC will not experience bone loss, bone thinning, or osteoporosis;

3. Bone Builder or MCHC restores bone strength;

4. Bone Builder or MCHC reduces or eliminates pain associated with bone ailments; and

5. Bone Builder or MCHC is more bioavailable, more absorbable, or more effectively utilized by the body than other forms of calcium or is more effective than other forms of calcium in the prevention or treatment of bone ailments.

PAR. 6. Through the use of statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time respondents made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis to substantiate that: adequate calcium intake has many benefits and is one of the essential factors in the

body's ongoing process of removal of old bone and replacement by new bone; in conjunction with other factors, adequate calcium intake can play a significant role in reducing the rate of bone loss or bone thinning and in protecting bone strength; and individuals who do not consume adequate calcium are at greater risk of experiencing bone fractures than those who do. However, respondents did not possess and rely upon a reasonable basis that substantiated the representations in paragraph five. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through D, respondents have represented, directly or by implication, that scientific research, including clinical tests, scientific papers and/or scientific studies, proves that:

1. Post-menopausal women who have lost bone and who use Bone Builder or MCHC will experience no additional bone loss or bone thinning and will achieve a growth of new bone and increased bone thickness greater than the amount of bone lost;

2. Users of Bone Builder or MCHC will not experience bone loss, bone thinning, or osteoporosis;

3. Bone Builder or MCHC restores bone strength;

4. Bone Builder or MCHC reduces or eliminates pain associated with bone ailments; or

5. Bone Builder or MCHC is more effectively utilized by the body than other forms of calcium or is superior to or more effective than other forms of calcium in the prevention or treatment of bone ailments.

PAR. 9. In truth and in fact, the representations set forth in paragraph eight have not been proven by scientific research, including clinical tests, scientific papers and/or scientific studies. Therefore, the representations set forth in paragraph eight were, and are, false and misleading.

PAR. 10. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Anthony not participating.

EXHIBIT A

...se Vitamin Shoppe® Call Toll Free 800-223-1216 Bea METAGENIC EXHIBIT A

# The Case of the Incredible Shrinking Woman

By Carrie Sutherland

Paleoanthropologists of the future may be puzzled by the strange case of the shrinking woman of the 20th Century—that is, the one out of every four women who will shrink from one to eight inches in height after menopause and, should she live to be 90, in a few unpretty, painful years will, the incidence of shrinking will rise from 25% to 100%! "Paleoanthropology" is a fairly open field for a scientist who researches ancient people by examining their bones. And one of these days we're going to be the "ancient people" whether we like the idea or not.

On the other hand, the 21st Century paleoanthropologist may not be the least bit surprised by the curved and bowed skeletons he'll find in looking back at us...as even thirty years ago, Calvin Wells, who wrote about the strange professional made it clear that the disorders and traumas of one group of people as disclosed by their bones, is not a matter of chance but is "the expression of stresses and strains to which they were exposed, a response to everything in their environments and behavior...influenced by their dark activations, their habits of diet." Or to paraphrase Shakespeare: "The dust you love can ruin us and ravish our bones!"

A preoccupation with the condition of the 20th Century shrinking woman by researchers around the world has developed a body of interesting information on when they scratch their heads or their tools for ways of prevention and cure. One of the problems seems to be the increasing longevity of people. In the days of the Roman Empire the female life expectancy at birth was barely age 23, as Robert Wishon, M.D. an early pioneer in female disorders and osteoporosis, reminds us. By the fourteenth Century Dr. Wishon said, female longevity had increased to 33 and by the turn of the 20th Century had risen to 48.

Today women are faced with a cumulative loss of minimum to 8½ or 9% so that we potentially have an aged citizenry of fairly perceive more women than men. Many of us born will become the object stared after the age of 45 or 50. In England a woman with signs of British understatement said, "Osteoporosis (considers...) the risk would of morbidity in the U.K. It occurs predominantly in the elderly more commonly in women."

The rate of bone loss in the last few years, also menopause is six times greater in a woman than in a man of similar age. This loss shows by age 65 but by then the loss may already have exceeded the amount of bone gained in the woman's formative years. As we age, loss from the long bones results in shortening the bone to the fracture point—hence broken arms, broken hips—while the loss of absorbular bone in the spine creates the incredible shrinking woman and even the new hump of older problems.

As much as these anchors of stature can be lost within a few short weeks! The organ of engineering this phenomena is usually overlooked by her new image. A massively shrunken stature hunched back and distended abdomen. Furthermore, this may be accompanied by an odd pain in vertebral fracture and pain...

...in the weight of the...

...whenever is the result of the total one, none of which fracture is the 12th leading cause of death in the U.S.

Which woman is likely to be the one out of four to become the incredible shrinking woman? No medical tests are available at this time of making such a determination sufficiently in advance before the damage has begun and is usually present. And then someone can. At the University of Florida, 250 women who were considered "at risk" aged 2 to 80 were screened and 33% were found to have less than average amounts of bone with 21% found to be osteoporotic.

Among the most significant factors in osteoporosis are early menopause, a family history of osteoporosis, poor diet, lack of exercise, the early use of tobacco or alcohol, long term use of steroids in the treatment of other diseases, poor digestion, small bones and slender frame as opposed to larger bones and overweight, chronic stress, a sedentary occupation, thin skin.

Obviously any one or more of these risk factors in the individual's life should stimulate the immediate start of a program of prevention to be continued for life, and this inevitably includes a nutritious diet, high in all necessary minerals, including calcium.

What is calcium "not just" calcium? What is has the $1100 name of "microcrystalline hydroxyapatite compound" (MCHC). For a decade this substance has been the object of research in Britain with amazing results. According to the work done there, this compound "contains the bone minerals calcium and phosphorus together with trace amounts of magnesium and fluoride in the normal physiological proportions." The British medical teams also there is "good evidence to suggest that preventive treatment is very effective" and, "recommends the use of this new whole bone extract."

This compound is not bone meal as we should be consumed with bone meal, even though it is whole bone extract. Unlike bone meal, it is not heated in the reduction process, instead it is processed at -68 F. Next is it washed with chemical solvents, as is done with bone meal. Then cattle raised for market on antibiotic-free cattle free pastures, the long bones are processed into the microcrystals, returning through the process all the minerals then originally consumed.

In one test at the Royal Free Hospital London, a group of women with a chronic liver disease were given Vitamin D, calcium gluconate and MCHC. These women were undergoing therapy for their liver disease with drugs known to promote bone disease through bone thinning and malabsorption of calcium. The group treated with Vitamin D carbonate and losing bone at the previous rate; calcium gluconate given another group experienced further bone thinning but the group given MCHC were found to have "positive cortical bone balance." The prestigious British Medical Journal reported this study saying "microcrystalline hydroxyapatite compound did restore bone."

As early as 1973 calcium gluconate and MCHC were tested against each other in elderly osteoporotic patients and MCHC came out ahead by a country mile with the research team declaring it "a valuable medium to calcium administration in metabolic bone disease." In discussing MCHC the researchers said "unlike some preparations of calcium salts the proportions of the mineral contents corresponds to the consumed physiological needs of the organism (that is you and me) since there are limits of bone itself."

In the intervening decade many other controlled tests have been conducted in English hospitals. A significant statement noted in a number of reports, MCHC either reduces or totally eliminated bone pain, which was not found true of any other substance.

In 1984 a report was published on patients whose osteoporosis was iatrogenic—i.e. induced, that is, osteoporosis resulting from medications prescribed for other problems. The British report said "Favorable biochemical and bone changes" when the researchers believed would continue with the extended use of MCHC into the future.

Only MCHC provides calcium in an "extremely bioavailable form" and the studies on it have also underlined the superiority of the substance over traditional soluble calcium supplements." Of the substance in use for many years now to halt the progress of osteoporosis, only one not including hydrogen fluoride was considered to be totally free of "major potential hazard," which indicated its use for both "the treatment and prevention of osteoporosis."

You would think with recommendations of that type, the product would be an everyone's top, since medical researchers are notoriously parsimonious of their praise. The product is well known and widely used in Europe, but we here in the States are just getting the word.

If a clinically hopped women at risk will be moved to begin a prevention program immediately so that there, too, do not join the ranks of the incredible shrinking women of the 20th Century!

**Risk Factors Contributing to Bone Loss**

1. Inherited predisposition (women over men, white women over black, small boned women over large)
2. Removal of ovaries at any age (oophorectomy)
3. Hysterectomy
4. Prolonged use of certain drugs such as members of the cortisone family, diuretics and antacids containing aluminum
5. Zero pregnancies
6. Digestive interference (stomach/intestinal resection, inadequate gastric juices)
7. Inadequate or inappropriate exercise
8. Poor diet, low calcium foods, high phosphate foods (refined carbohydrates, red meat, phosphate cola drinks, calcium antagonists like alcohol, caffeine containing beverages, tobacco)
9. Certain disease conditions: chronic liver disease, overactive endocrines (adrenals, thyroid, parathyroid), kidney disease, prolonged immobilization
10. Sedentary occupation, protracted bed rest, etc.


## DON'T GROW SHORTER AS YOU GROW OLDER

**The superior form of calcium proven to build bone**

The latest research shows "microcrystalline hydroxyapatite" is the superior form of calcium that can build bone. We call this exciting Ethical Nutrient's product BONE BUILDER. All the correct nutrients, minerals and trace minerals necessary for the body to build bone are present in balanced proportion. Some calcium supplements can be worse than not taking anything at all. At best, others may slow bone loss additionally stopping it. But BONE BUILDER can restore lost bone and has clinical evidence to prove it. Doesn't it make sense to win the battle rather than be constantly fighting it? Win the Battle with BONE BUILDER!

| Item No. | Size | Retail Price | VS PRICE |
|---|---|---|---|
| Fe 1053 | 120T | $ 8.95 | 15 16 |
| Fe 1054 | 270T | 12.95 | 26 38 |

EXHIBIT B

METAGENICS
EXHIBIT B

# WHY FOOL AROUND?

by Gene Birkeland

Recently on an interstate auto safari, my car broke down (as they are wont to do at the most critical times) and I was stuck for the night in a small town motel.

Since I was depressed with my circumstances, I flung myself on the bed, and began listening to the news.

A reporter came on with a story about osteoporosis. Now that really depressed me. Her story was superficial and badly researched, but what depressed me most was the thought of the thousands of people who might see it and believe this misinformation.

To illustrate her assertion that a simple elevation of calcium intake was the answer to osteoporosis, she'd taken several glasses of distilled white vinegar and dropped different brands of calcium tablets into them. This was supposedly an illustration of how they might dissolve in your stomach, and, of course, some of them didn't.

The one that dissolved most quickly was a well-known drug store product manufactured by a major pharmaceutical company containing a relatively small amount of calcium. What she didn't point out were the additives the product contained besides oyster shell powder (which is poorly absorbed in humans).

To bolster her story and give it credence, she threw in the name of a local medical doctor who confirmed her position that a high intake of calcium is the best way to prevent osteoporosis.

Nothing was said about the controversy which rages within scientific circle questioning whether calcium alone is the answer to osteoporosis.

For example, the prestigious British Medical Journal five years ago, in an article on the Non-hormonal Treatment Of Osteoporosis said, "Osteoporosis may be defined as the loss of bone accelerated beyond the normal "physiological" rates, although this begs the question of what normal loss might be ... Its recognition, measurement, prevention and treatment were discussed at a recent symposium and the account of this emphasizes how opinion on these issues is still divided."

***"... in osteoporosis it appears other factors are at work, not just an absence of sufficient calcium in the diet."***

Guy Abraham, MD., an internationally recog-

ADDITIVES CONTAINED IN A POPULAR DRUG STORE CALCIUM SUPPLEMENT

| | | | |
|---|---|---|---|
| Corn Syrup Solids | Talc | Hydroxypropyl | Methyl cellulose |
| Corn Starch | Sodium Starch Glycolate | Calcium Stearate | Polysorbate 80 |
| Pharmaceutical Glaze | Titanium Dioxide | Vitamin D | Methlypropyl Paraben |
| Polyvinylpyrrolidone | Carnauba Wax | Polyethylene Glycol | D & C Yellow #10 Dye |
| Acetylated Monoglyceride | Edetate Di-sodium | FD & C Blue #1 Dye | Simethicone Emulsion |

EXHIBIT B

nized authority on the endocrinology of obstetrics and gynecology, in a conversation with me, as well as in public speeches, has pointed out that no country in the world has set calcium requirements as high as the United States — and no country has more bone problems. Dr. Abraham has been the recipient of at least two international awards for his work, part of which stemmed from his research while heading ob-gyn endocrinology research at UCLA's Harbor General Hospital in Los Angeles, CA.

There, Dr. Abraham had found that women with severe premenstrual tension had too much dairy food in their diets, and too high a calcium intake relative to their magnesium intake. As he pointed out, animals such as elephants and gorillas grow huge skeletons eating only green plants, which have twice as much magnesium as calcium. Dr. Abraham took the women off dairy products to reduce calcium intake, while upping their consumption of vegetable greens to increase magnesium intake. The result? No more premenstrual tension.

*"... microcrystalline hydroxyapatite halted bone loss, decreased pain and increased bone thickness when taken in adequate amounts over long enough periods of time, a record no other form of calcium could achieve."*

In osteoporosis, it appears other factors are at work, not just an absence of sufficient calcium in the diet. And, at least a quarter century has passed since calcium retention was shown not to be adequate without a modicum of estrogen to enhance the calcium uptake — or it is merely excreted in the urine. Only a medical doctor can prescribe estrogen, but the enterprising TV reporter never mentioned the importance of the relationship.

No doubt many people were likely to believe her over-simplification. Yet osteoporosis is still a major health problem, which to some extent continues to baffle the medical research world. Research project reports on possible causes and potential cures for osteoporosis are frequently published to this day in the medical literature.

The only positive reports on halting the devastation and crippling of osteoporosis have come through the medical administration of small, carefully monitored quantities of estrogen along with calcium, or through the administration of a product little known in the United States, but widely used in Europe and England: microcrystalline hydroxyapatite.

In a clinical trial in England, for example, a group of women with bone disease were divided into 3 matched groups. The result was "Over the 14-month follow-up, there was a significant loss of cortical bone in controls, a significant increase in cortical bone thickness in the MCHC (microcrystalline hydroxyapatite) group, and no change in the CG (calcium gluconate) group." The MCHC group had a net cortical bone gain of 11.6%. (Cortical bone is the outer bone)

The research team from the Royal Free Hospital in London, described the substance they were testing: "MCHC powder is prepared from bovine bone and provides both the organic and inorganic constituents occurring in normal bone. The powder contains hydroxyapatite microcrystals, calcium, trace metals (including zinc, silicon and iron), protein, amino acids and aminoglycans."

Another advantage the research team noted was the low sodium content of MCHC compared to calcium gluconate which was of advantage in "long-term treatment of patients with cirrhosis or other diseases complicated by salt retention."

The prevention of osteoporosis follows that old adage that "an ounce of prevention is worth a pound of cure" as most adults lose bone steadily throughout their lives. This loss is accelerated in women after the menopause, a situation which led to British researchers to advise, "the only way to prevent osteoporosis is to make sure that the subject starts his or her aging process with well-mineralized bones." (emphasis added)

Too often, however, nothing is done until a fracture occurs either crushing the trabecular (inner) bone in the spine which causes pain as well as

## EXHIBIT B

height loss, or the fracture of a long bone. Some studies show a trend toward "fracture of the wrist at 60, of the shoulder at 70, and the neck at 80," though such fractures are seldom attributed to osteoporosis.

In fact, one research team has stated: "The perceived frequency of osteoporosis is unrealistically low and usually the diagnosis is made only when crush fractures of the vertebral bodies occur and consequently lead to loss of height."

*"Nothing was said about the controversy which rages in the scientific research papers that calcium alone is not the answer to osteoporosis at all!"*

In another clinical trial, 10 grams of MCHC containing approximately 1,500 mgs of calcium was used over a period of nine months on patients who were in severe pain, had recent fractures and were on analgesics (pain killers). The majority reported less bone pain with a subsequent decrease of intake of analgesics and an increase in plasma calcium.

In another trial group of individuals aged 70 to 98, the whole bone extract was used because "the proportions of the mineral content correspond to the presumed physiological needs of the organism since they are those of bone itself ... it was found that the whole-bone extract significantly increased absorption of the tracer suggesting it is a valuable medium for calcium administration in metabolic bone disease." In this latter test the research team also concluded, as had others before and since, that the whole bone extract was better than calcium gluconate which they had checked out at the same time.

These are just a few of the controlled clinical trials to be found in medical literature. The consensus of which is that microcrystalline hydroxyapatite halted bone loss, decreased pain and increased bone thickness when taken in adequate amounts over long enough periods of time, a record no calcium supplement could achieve.

The product has been available in Europe and England for years and is now available in the United States under the name Bone Builder (formerly Ethi Cal).

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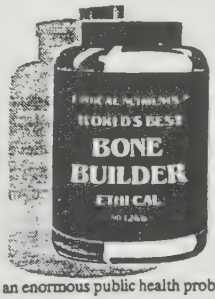
EXHIBIT C

METAGENICS
EXHIBIT C

# WORLD'S BEST BONE BUILDER

√ All necessary bone building nutrients in one tablet
√ Formulated by nature
√ Processed using breakthrough technology
√ Completely safe




√ Successfully tested and used in Europe for over 10 years
√ Available for first time in U.S.
√ Contains most absorbable kind of calcium
√ Not to be confused with bone meal or ordinary hydroxyapatite

**THE PROBLEM:** Osteoporosis is an enormous public health problem, responsible for at least 1.2 million fractures in the United States each year. One third of women over sixty-five will have vertebral fractures. By extreme old age, one of every three women and one of every six men will have had a hip fracture. Hip fracture is fatal in 12-20% of cases and it results in long term nursing home care for half the patients who survive. More women die from the complications of fractures yearly than the combined deaths resulting from cancer of the cervix and breast. The direct and indirect costs of osteoporosis are estimated at 6.1 billion dollars annually in the United States. Furthermore, the gradual loss of bone results in disfigurement, wrinkling, decreasing mobility and the deposition of calcium in soft tissue (kidney, arteries, joints, etc.) leading to further complications.

**THE SOLUTION:** Regular exercise, a whole foods diet, smoking cessation, and adequate absorption of micro-nutrients will end the current rapid bone loss epidemic in the United States population.

**GREAT NEWS!** A COMPLETE, NATURE-MADE, BONE FOOD IS NOW AVAILABLE. THIS BONE FOOD IS **BONE BUILDER (formerly ETHI CAL).**

**THE BONE BUILDER STORY:** BONE BUILDER is a pure microcrystalline hydroxyapatite compound (MCHC), a substance which has been scientifically demonstrated to be the most effectively utilized source of calcium known. This highly useful substance is distinguished by its unusual ability to be absorbed into the bloodstream. For example, studies have demonstrated it to be absorbed at twice the rate of calcium gluconate. Hydroxyapatite is a complex calcium salt which forms the basis of bone. It has an ideal calcium/phosphorus ration of 2:1.

A considerable number of laboratory and clinical studies have been undertaken to understand the nature and value of MCHC. Using animal studies, researchers have demonstrated a lack of both acute and chronic toxicity. Thus, we know MCHC to be completely safe.

Clinically, MCHC has been shown to be highly effective. For example, in one study of postmenopausal women a comparison was made between MCHC, calcium gluconate and a control group. Over a 14 month period, the control group experienced a 5.5% bone loss, the calcium gluconate group a 1.5% bone gain, while

## EXHIBIT C

**the MCHC group experienced a 6.1% bone gain.** Positive calcium balances were reported in other clinical studies using MCHC to treat osteomalacia (bone softening). In yet another study the author states "... **we have demonstrated that MCHC dramatically reduces skeletal pain** in patients developing osteoporosis, and have also presented strong evidence that this symptomatic improvement is associated with both favorable biochemical and radiological bone changes".

**BONE BUILDER SOURCE:** The MCHC contained in BONE BUILDER has been derived solely from the bones of healthy animals raised in an environment free from pesticides, insecticides, growth hormones and other environmental contaminants. It has been processed by an exclusive technique which preserves the natural qualities inherent in the raw substance. This is in marked contrast to the preparation of bone meal, which is an ashed residue, devoid of life, having been subjected to considerable heat, and washed with chemical solvents. This harsh processing causes the protein matrix to cross-link, altering the value of the collagen, and considerably reducing the effectiveness of the subsequent preparation. Also, bone meal often contains an unacceptably high amount of lead. BONE BUILDER does not. In essence, BONE BUILDER may be considered a minimally-processed, complete nature-made food for the bone.

**CHEMICAL PROPERTIES OF MICROCRYSTALLINE HYDROXYAPATITE:** MCHC is a complex salt in which 3 molecules of calcium phosphate are associated with 1 molecule of calcium hydroxide. Hydroxyapatite occurs as hexagonal needles arranged as rosettes. These are embedded in a protein matrix. Its chemical name is decacalcium dihyroxide hexxakis-(orthophosphate).

Apart from calcium and phosphorus, other major minerals present in MCHC are sodium, magnesium and potassium. Unlike commercial soluble calcium supplements, the sodium content is low (0.65%), a factor of importance for some consumers.

The main trace minerals present are zinc, silicon, and iron. Others include rubidium, caesium and platinum, as well as many others.

MCHC contains 14% collagen and 4% other proteins, as well as hydroxyproline. Other amino acids present in relatively high amounts including glycine and glutamic acid. Also included are glucosaminoglycan, citrate, flouride (0.008%) and water.

**SUMMARY:** BONE BUILDER consists of microcrystalline hydroxyapatite which, itself being from bone, is a complete bone food. BONE BUILDER is not merely another calcium supplement, although it happens to be the most highly absorbable form of calcium known. BONE BUILDER is hypoallergenic, palatable and cost-effective. Most importantly, **no other product in the United States is as effective at preventing bone loss.**

**REFERENCES:** Available upon request. Please ask for "MCHC scientific references".

*For FREE Literature Pack Contact: Ethical Nutrients • 23180 Del Lago • Laguna Hills, CA • 92653*

*1-800-692-9400 (Nationwide) 1-800-833-9536 (In California)*

EXHIBIT D

METAGENICS
EXHIBIT D

# STRONG BONES -- YOU NOW HAVE A CHOICE

by Gene Birkeland

You may be able to remember a book, "Life Begins at Forty." Fortunately, I don't, so you're much older than I—I only remember the title, which has become almost cliche', and while many other things may also begin at forty, some of them are not so great.

Forty may well be the time for a good many of us when the sins and errors of our youth begin to show up, creating situations in our bodies for which we never bargained, and are quite often at a loss to understand.

One of these incomprehensible conditions, now occuring on a fairly large scale, is osteoporosis, in which abnormal mineral loss over a long period of time causes weakened bones susceptible to sudden breakage and/or a painful shrinkage of the spine.

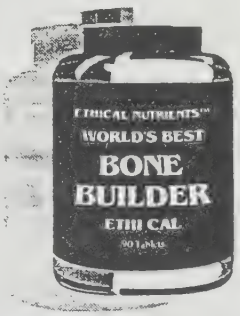
From personal experience I know that the average physician does not understand the chemistry involved in this painful condition, but I also have the words of some of the doctors themselves as they discussed this problem in a symposium in England not too long ago.

These research specialists concluded, "Early diagnosis is difficult because osteoporosis is asymptomatic until it is advanced far enough to cause structural failure of bone." And, continues the specialists, "opinion is still divided on the recognition, measurement, prevention and treatment" of osteoporosis.

This is true. I have observed the slow disintegration of my mother from a woman of slim build and average height to a very short statured dowager. Over these last ten years she has shrunk some 5 and 1/2 inches, and the only remedy her busy Hollywood-star struck physician has offered is an occasional cortisone shot to alleviate the pain.

Her situation is not unique. When the pain began in her back (the result of a vertebrae fracturing and compressing the disc), I drove her to the doctor's office, telling her to ask him if this was not related to a loss of calcium.

Emerging from his office later, she said, "You were right! He said he saw x-rays of my spine three years ago which showed calcium loss even then." I looked at her in amazement and consternation. "Are you telling me he's known this for three years and hasn't told you about it or advocated any sick remedy?" "Well, what could he do?" she said.




Even at that time he could have taken the known medical steps to prevention of further loss which consisted of small daily quantities of conjugated estrogens accompanied by calcium supplementation. He happens, however, to belong to that school of medicine which scorns all supplements and still believes all estrogens are carcinogenic.

His management of the condition was to dispense occasional shots of cortisone without regard that long-term use of steroids causes further mineral loss, as does inactivity and complicating major disease conditions.

Ten years later, Mother is restricted to the use of canes and walker and is relatively inactive.

So prevalent is this type of situation that the British doctor who reported on the symposium, Allan St.J Dixon (Royal National Hospital for Rheumatic Diseases), stated, "Osteoporosis thus appears to join diabe-

EXHIBIT D

tes, gall stones, and diverticulosis as one of the diseases of affluence."

"The perceived frequency of osteoporosis," says Dr. Dixon, "is unrealistically low and usually the diagnosis is made only when crush fractures of the vertebral bodies occurs and consequently lead to loss of height,"—yet, continues Dr. Dixon, studies show the condition leads to "fractures of the wrist at 60, of the shoulder at 70, and the femoral neck at 80."

Even though men are also victims of the bone-thinning process and some evidence of it usually shows up by age 70, women are by far the predominant sufferers which begins at least as early as the menopause— whether surgically or naturally occuring.

*"Dixon cited hospital trials of the substance (in which) . . . microcrystalline hydroxyapatite concentrate did restore bone."*

Dr. Dixon has observed that in the United States even well-fed women had an average intake of calcium of 660 mg per day.—"Well below the recommended daily intake of 800 mg"—a figure, he says, "which many nutritionists would still regard as being too low."

As a result, Dr. Dixon concluded, "calcium seems to be the forgotten nutrient of Western society, and it seems that a failure to consume enough of it must inevitably lead to loss of bone mineral."

There needs to be an alternative, says Dr. Dixon, (and there is) which is safe, effective, inexpensive and may be continued over years without harm, especially as bone rebuilding and strengthening cannot be expected to take place rapidly.

He has reviewed all the alternatives which have been the object of studies by his colleagues, such as the use of many varieties of calcium supplements in conjunction with other substances. All were found wanting.

Dixon's research of the many common forms of calcium used in the trials demonstrated effectively that only one form of calcium was capable of preventing bone thinning and actually restoring bone strength, and that was "whole bone extract (microcrystalline hydroxyapatite concentrate) (which) is well absorbed and does not have the disadvantages of the former preparations."

Microcrystalline hydroxyapatite concentrate contains the bone minerals calcium, phosphorus and magnesium together with trace amounts of zinc, copper, manganese, and other trace and ultratrace elements in the normal physiological proportions.

Dixon cited hospital trials of the substance making a comparison of it to calcium gluconate which "halted the bone loss but did not restore it, whereas microcrystalline hydroxyapatite concentrate did restore bone."

Concluding his remarks, Dr. Dixon added, "Nothing can restore the spinal posture to normal in those people whose spines have already shrunk because of osteoporosis, (but) there is good evidence to suggest that preventative treatment is very effective."

Where there is evidence that osteoporosis "runs in the family," and where there is evidence that calcium loss is already taking place, i.e., muscle spasms, receding gums, or loss of height, the ability of the microcrystalline hydroxyapatie (bone) concentrate places prevention as a matter of the individual sufferer's choice. This safe, reliable, inexpensive, scientifically-tested preventive is his/hers to take as they choose and not dependent upon the whim of another.

Probably just like you, I get fed up with swallowing supplements. Yet I have only to visit my mother to see the alternative which inadequate attention to prevention has created: being condemned to hobbling around in continual pain supported by cane or walker, or just sitting.

The supplement which I have been discussing, microcrystalline hydroxyapatite concentrate, is not merely bone meal, but is instead specially selected portions of the bones of animals raised in the absence of pesticides and insecticides. These bone sections are carefully processed (ground up) at less than 98° to preserve the essential microcrystalline structure as it exists in raw bone. It has been available in Europe and England for some years and is now available in the United States under the name Bone Builder (formerly Ethi Cal), and is sold exclusively by Ethical Nutrients ofLaguna Hills, CA.

*For FREE Literature Pak Contact: Ethical Nutrients • 23180 Del Lago • Laguna Hills, CA 92653*
*(714) 855-1718 (Local) • 800-833-2956 (In California) • 800-592-9400 (Nationwide)*

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 3.25 of its Rules, now in further conformity with the procedure described in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Metagenics, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 971 Calle Negocio, San Clemente, California.

Respondent Jeffrey Katke is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and, and his office and principal place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

3. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn

by the Commission pursuant to the provisions of Section 3.25(f) of the Commission's Rules, the Commission may, without further notice to respondents: (1) issue its amended complaint corresponding in form and substance with the draft of amended complaint attached hereto and its decision containing the following order to cease and desist in disposition of the proceeding; and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the amended complaint and decision containing the agreed-to order to proposed respondents' address as stated in this agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The amended complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

## ORDER

### I.

*It is ordered*, That respondents Metagenics, Inc., a corporation, doing business as Ethical Nutrients, or under any other name, its successors and assigns, and its officers, and Jeffrey Katke, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Bone Builder or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall not represent, in any manner, directly or by implication, that:

1. Post-menopausal women who have lost bone and who use such product will experience no additional bone loss or bone thinning or will achieve a growth of new bone or increased bone thickness greater than the amount of bone lost;

2. Users of such product will not experience bone loss or bone thinning;

3. Such product restores bone strength;

4. Such product reduces or eliminates pain associated with bone ailments; or

5. Such product is more bioavailable, more absorbable, or more effectively utilized by the body than other forms of calcium, or is superior to or more effective than other forms of calcium in the prevention or treatment of bone ailments,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

*It is further ordered*, That respondents Metagenics, Inc., a corporation, doing business as Ethical Nutrients, or under any other name, its successors and assigns, and its officers, and Jeffrey Katke, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Bone Builder or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall not misrepresent, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

III.

*It is ordered*, That respondents Metagenics, Inc., a corporation, doing business as Ethical Nutrients, or under any other name, its successors and assigns, and its officers, and Jeffrey Katke,

individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Bone Builder or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, insofar as said respondents make any representation, in any manner, directly or by implication, regarding the relationship between calcium and osteoporosis:

A. Shall limit any such representation to the health claims authorized by the Food and Drug Administration for calcium and osteoporosis as set forth in Section 101.72 of Title 21 of the Code of Federal Regulations, 58 Fed. Reg. 2665 (1993), and any amendments thereto; or

B. At the time of making such representation, shall possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

*It is further ordered*, That respondents Metagenics, Inc., a corporation, doing business as Ethical Nutrients, or under any other name, its successors and assigns, and its officers, and Jeffrey Katke, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of:

A. Bone Builder or any food or dietary supplement, food, or drug containing calcium, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall not make any representation, in any manner, directly or by implication, that any such product will treat, cure, alleviate the symptoms of, prevent, or reduce the risk of developing any disease, disorder, or condition; or

B. Any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission

Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall not make any representation, in any manner, directly or by implication, that any such product is more effective than any other product in treating, curing, alleviating the symptoms of, preventing, or reducing the risk of developing any disease, disorder, or condition,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

V.

Nothing in this order shall prohibit respondents from making any representation that is specifically permitted in labeling for any such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VI.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VII.

*It is further ordered*, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. Any advertisement making any representation covered by this order;

B. All materials that were relied upon in disseminating such representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such

representation, including complaints from consumers, and complaints or inquiries from governmental organizations.

VIII.

*It is further ordered*, That respondent Metagenics, Inc., or its successors and assigns, shall:

A. Within thirty (30) days after the date of issuance of this order, provide a copy of this order to each of its operating divisions, subsidiaries, principals, officers, directors, managers and distributors, and to each of its employees, agents, and representatives engaged in the preparation, placement, or dissemination of advertisements, promotional materials, product labels, or other such sales materials covered by this order; and

B. For a period of five (5) years from the date of issuance of this order, provide a copy of this order to each of its principals, officers, directors, managers and distributors, and to all employees, agents, and representatives engaged in the preparation, placement, or dissemination of advertisements, promotional materials, product labels, or other such sales materials covered by this order within three (3) days after the person commences his or her responsibilities.

IX.

*It is further ordered*, That respondent Metagenics, Inc., its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in the acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which the respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

*It is further ordered*, That for a period of five (5) years from the date of issuance of this order, respondent Jeffrey Katke shall provide written notice to the Federal Trade Commission within thirty (30) days of:

A. Any change in his business or employment that may affect compliance obligations arising out of this order;

B. The discontinuance of his business or employment; and

C. His affiliation with any new business or employment; each such notice to include his business address and telephone number, home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XI.

This order will terminate on October 23, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XII.

*It is further ordered*, That respondents shall, within sixty (60) days after service upon them of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Anthony not participating.

IN THE MATTER OF

# MID-SOUTH PCM GROUP, P.C., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3773. Complaint, November 5, 1997--Decision, November 5, 1997*

This consent order prohibits, among other things, the Tennessee-based corporations and its officer from claiming that PCM ortho-k or any substantially similar service provides a cure for vision deficiencies; that all people can achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear devices used with such services occasionally or at night; that the four academic studies prove PCM ortho-k is safe and effective in correcting nearsightedness, farsightedness, and astigmatism; and that PCM ortho-k has been approved by the FAA and all branches of the military. In addition, the consent order requires reliable scientific evidence for any future success or efficacy claims.

## *Appearances*

For the Commission: *Christa Vecchi, Matthew Daynard* and *Dean Graybill.*

For the respondents: *John L. Ryder, Apperson, Grump, Duzane & Maxwell*, Memphis, TN. and *Michael Evangelisti, Black, Babango & Morgan*, Memphis, TN.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Mid-South PCM Group, P.C., Eye and Vision Clinic, P.C., and International Computerized Orthokeratology Society, Inc., corporations, and J. Mason Hurt, O.D., individually and as an officer of the corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent Mid-South PCM Group, P.C. ("Mid-South") is a corporation formed under the laws of the state of Tennessee, with its principal office or place of business located at 2865 Summer Oaks Drive, Bartlett, TN.

2. Respondent Eye and Vision Clinic, P.C. ("Vision Clinic") is a corporation formed under the laws of the state of Tennessee, with its principal office or place of business located at 2865 Summer Oaks Drive, Bartlett, TN.

3. Respondent International Computerized Orthokeratology Society, Inc. ("ICOKS") is a corporation formed under the laws of the state of Tennessee, with its principal office or place of business located at 2865 Summer Oaks Drive, Bartlett, TN.

4. Respondent J. Mason Hurt, O.D., is the sole owner and President of the corporate respondents. He formulates, directs, and controls the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondents.

5. Respondents are engaged, and have been engaged, in the promotion, offering for sale, sale, and distribution to the public of ophthalmic services, including orthokeratology ("ortho-k") or "Precise Corneal Molding" ("PCM") services, which involve the use of a series of contact lenses purportedly to reshape the cornea gradually for the treatment of myopia (or "nearsightedness"), hyperopia (or "farsightedness"), and astigmatism. The contact lenses used in these PCM ortho-k services are "devices," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

6. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

7. In the course and conduct of their business, respondents have disseminated or have caused to be disseminated advertisements or promotional materials for the purpose of promoting the sale of PCM ortho-k services. Respondents advertise and promote their services through the use of print advertisements, radio and television advertisements, internet advertisements, free consultations, videos, brochures, and pamphlets, which are provided to patients and prospective patients, and some of which are provided to other optometrists for distribution under their own name to patients and prospective patients. Respondents' advertisements and promotional materials include, but are not necessarily limited to, attached Exhibits A through H.

8. The advertisements and promotional materials referred to above, including but not necessarily limited to attached Exhibits A-H, contain the following statements:

A. "21st Century Eyecare"

"Saturday 10 a.m. - 12 p.m. ET

It sounds too good to be true -- a safe, non-surgical alternative to restore clear vision safely, gently, and permanently.

In a modest departure from ordinary talk radio, Talk America will air a new program featuring an emerging national network of eye doctors who are performing a new, non-evasive (sic), non-surgical corrective vision procedure that reshapes the cornea, much lie (sic) braces straighten teeth. It's called 21st Century Eyecare....

Dr. J. Mason Hurt, a Memphis-based optometrist, has developed a revolutionary new corrective eye procedure called Precise Corneal Molding (PCM for short), that will soon render glasses and contact lens (sic) obsolete....

Precise Corneal Molding is the result of merging technology and physiology. PCM evolved from a procedure called ? orthokeratology,' clinically practiced for over thirty years. Orthokeratology involves reshaping the cornea by fitting patients with a series of special hard contact lenses, each having a slightly different curve. Orthokeratology was limited by the older technology of the lenses and the difficulty in precisely monitoring and controlling the reshaping process.

Send Email Directly to Dr. Hurt and Sam Cooper." (Exhibit A) (Internet Ad)

B. "Precise Corneal Molding (PCM):
Your Clearest Choice, Your Greatest Freedom"

"....In many cases, just a matter of days to weeks frees the majority of the patients from their dependence upon eyeglasses or contacts during daytime hours.

....By slight modification in the shape of the cornea, clear functional vision may be restored to the individual.

Recently several surgical procedures have been developed to attempt to accomplish the same purpose. However, their limited success has been due to the effects off (sic) scarring, irregular healing and most importantly, its temporary effect....In addition, the surgical scars cause surface irregularities on the cornea, resulting in permanent blurring that even glasses or contacts cannot eliminate. Molding avoids those complications since there is not injury to any eye tissue. The soft cornea simply reshapes itself to fill the mold. The mold is similar to a contact lens in its appearance and sensations upon wearing. The mold is worn while sleeping and/or while awake. The procedure takes just hours in mild cases to a few months in very difficult cases to reach good functional vision. The mold is worn regularly until the best vision is achieved and the cornea is allowed to stiffen in its new shape. At that point the mold wearing is gradually reduced until a minimal wear time is established that maintains that shape and good functional vision. This guarantees continued clarity without the gradual blurring that usually accompanies the surgery. Therefore, the cornea can easily be fine tuned the rest of ones (sic) life by minor modification in the retainer mold.

....PCM opens new horizons to everyone regardless of age, occupation, or ability to wear contact lenses in the past.

PCM is safe, reliable and inexpensive. PCM gives you a cure, not a maintenance of your visual handicap...." (Exhibit B) (Patient Handout)

C. "Precise Corneal Molding"

"....'I shifted from soft contact lenses to PCM and I can see 20/20 when I take them off!' -- T.K

'I have been through the program and I am very happy with the results. I'm taking my daughter in for Precise Corneal Molding, too!' -- A.S. ....
COMPARE
PCM is a safe, gentle, affordable, non-surgical alternative for wearers of glasses.

| | Surgery | PCM |
|---|---|---|
| Age as a limiting factor | Yes | No |
| Reversibility | No | Yes |
| Loss of work time | Yes | No |
| Worsening of night vision | Yes | No |
| FAA and military approval | No | Yes |

What is PCM?
Imagine being able to easily read an alarm clock without your glasses, see street signs clearly, or participate in sports without lenses of any kind....
...Because the procedure is non-invasive, PCM has provided thousands of patients with better vision without the risks or complications of surgery.
...PCM utilizes a series of prescription eye molds to reshape the cornea much like orthodontists use braces to straighten teeth....
...The benefits are realized in weeks or months, depending on the severity of vision problems. Retainer molds will be used on a limited basis to maintain the new shape of the cornea.
Since 1962, PCM and its predecessor, Orthokeratology, have been used to help pilots, athletes and others requiring unaided vision. Now, new research developments such as computerized corneal topography and new mold designs and materials have established PCM as the eye care trend of the future.
The Safest Option
In contrast to Radial Keratotomy and laser surgery, PCM does not require injury to the eye, resulting in glare-inducing scars. There is also no disruption of vision as eyesight improves.
PCM for Children
One of the most exciting uses for PCM is controlling nearsightedness in children....PCM prevents deteriorating vision and even reverses it.
Proven Safe Results
PCM is highly effective in correcting nearsightedness, farsightedness and astigmatism....University research studies have shown corneal molding to be safe and effective. These studies include The University of Houston College of Optometry (5 years), University of California at San Diego Medical School (7 years), University of California at Berkeley College of Optometry (3 years), and Pacific University College of Optometry (5 years)." (Exhibit C) (Patient Handout)

D. "Precise Corneal Molding"

JIM LINDSEY speaks as the words scroll down the screen: "Over 190 million men, women and children in America are lifetime victims of poor vision. Millions of Americans are chained to the use of glasses and contact lenses.... There is a solution today. If you are one of the 190 million Americans, this show is for you. Precise Corneal Molding, three words that will change the way you see the world, without glasses or contact lenses.

In the next 30 minutes, you will be introduced to a gentle, non-surgical, affordable procedure that will make glasses and contact lenses a thing of the past

in your life....From 8 to 80, Precise Corneal Molding clearly is the medical eye care breakthrough of the century.

The gift of sight, a sense given to all human beings [spoken while the following is printed on screen: a gift given to nearly every human being at birth], yet more than 75 percent of Americans have vision disorders that require prescription glasses or contact lenses to correct. They do bring improved vision, but with every prescription change, the vision grows weaker and weaker, not stronger.

To eliminate vision disorders, surgical procedures have been developed and introduced but with limited results. In the 1960's, before the popularity of soft contact lenses, an ortho-keratology procedure was developed that could actually reshape the cornea of the eye and caused improved vision for a limited time.

The procedure was accepted by the FAA, a department of the Federal Government that regulates the airline industry....

In 1992, Dr. J. Mason Hurt, an optometrist, perfected a process called Precise Corneal Molding or PCM. With PCM, patients who had previously worn glasses or contact lenses were able to see without the use of either and without surgery. Here is why."

DR. J. MASON HURT, O.D. (perfected P.C.M. process): "Corneal molding is very safe and effective, and I would like to show you why (standing in front of diagram of the eye). The cornea or the clear window that we see through is very soft and is subject to change. It changes its shape on a very regular basis....

The cornea wants to change shape. Now we just guide it to the shape we would like for it to have, and we do that by building a mold which will rest (draws on diagram) in the zone where we are having our shape problems, and we can reshape this cornea in a fashion very similar to wearing of contact lenses in a safe, nonsurgical, noninvasive technique that we call Precise Corneal Molding."

STEVEN FENSLER, Computer Programmer: "....And for the past two years, I had been wearing reading glasses along with my contacts so that I could read pages, and then I was getting very tired. Been on molds for seven months, and I don't use my reading glasses anymore at all, either with my contacts or without them. I can see everything at work I want to see...."

PEGGY COLLINS, College Coordinator: "You can see. It does correct your vision....There is no surgery, there is no blood....Just little contacts in your eyes, you sleep with them at night....I recommend it."....

CONNIE BRADEN, Homemaker: "Scott [her son] had broken his glasses at school, and we came to get his eyes checked, and his eyes had gotten so bad in just a few months that I was told that he would have to have glasses changed every six months. So we started with the contacts, and within one week, he could see 20/20."

CRAIG JARRELL, Oriental Rug Sales: "For anyone that has problems seeing, I would recommend it to all my friends that wear glasses; they need to come up here and get this done. It's just great to be able to take contacts out and still be able to see."....

ANN POSEY, School Teacher: "....my vision had just gotten so bad, and I couldn't wear contacts any more, didn't like wearing glasses, wasn't wanting to have any type of surgery....Knowing that my vision is going to be 20/20 all the time is just really exciting...."

....JACKIE GREENE, Sales Manager: "I heard about this procedure and it really sounded too good to be true. But I am so excited about it now because I've

probably had the procedure maybe six weeks, and already, within six weeks, I can drive my van without any corrective lenses whatsoever...."

....DR. HURT: [explains the PCM procedure to a patient by using the map of her cornea] "....As we keep it centered, all of these [pointing to various parts of the cornea] will mold away. So we are going to be able to mold away your astigmatism as well as your nearsightedness. And as we end up with this pink, what I call smiley face down here, then you will have your bifocal as well...."

....ANN POSEY, School Teacher: "Number one, it is wonderful to be able to wake up in the morning and to open my eyes and to see everything around me with no contacts in, nothing in, just to be able to open them up and to see....Number two, there is such security knowing financially that later in life I am not going to have to buy more glasses, change my prescriptions, get more prescription sun glasses. I am not going to have to lose a contact and find it or anything like that. I know that my vision, I am going to be able to see. And that is just wonderful."....

NARRATOR: "....Now, through Precise Corneal Molding you can see clearly day or night and continue to see clearly for the rest of your life without depending on glasses or contact lenses...."

....JACKIE GREENE, Sales Manager: "I am very excited about this procedure, because it will work for children and I have four kids of my own. And for them not to have to go through what I went through in the third grade, if any of them for any reason has a vision problem and needs corrective lenses, they will definitely get this procedure."....

ELLYN BENGAL, Bookkeeper: "I have been doing this about a year now....If for some reason I need my glasses, I have to hunt for them up now....But mostly, I don't wear, you know, anything. I use the molds at night and a little bit during the day but not much." ....

DR. HURT: "Precise Corneal Molding is becoming the procedure of choice all across the country. No longer do you have to be satisfied with just getting by or being visually handicapped. It is now the best that science has to offer....YOU can enjoy the freedom of seeing again without the use of glasses or contact lenses. No more wearing glasses, no more wearing contacts. The opportunity of seeing well all the time without being dependent upon these is now a reality and not a dream...." (Exhibit D) (Infomercial)

E. "60 Sec Radio Commercial"

"You were not born to wear glasses or contacts. All of us were designed to have clear vision. And now, when the design needs correction, there's Precise Corneal Molding. Precise Corneal Molding is safe, gentle, non-surgical method of correcting nearsightedness and farsightedness that works!! It can also eliminate astigmatism and restore good functional vision without the use of glasses. The P-C-M practitioner in your area is offering a free corneal topography consultation so you can see how P-C-M can work for you! All you have to do is call 1-800-846-2-0-2-0 that's 1-800-846-TWENTY-TWENTY!! The call is free and the improved vision without glasses is....well....priceless...." (Exhibit E)

F. NARRATOR: "Thousands of men, women and children all over the country are experiencing the gift of improved vision without glasses or contact lenses. Precise Corneal Molding, three words that will change the way you see the world. Precise Corneal Molding is a safe, gentle, nonsurgical, affordable procedure that corrects nearsightedness and farsightedness.

PCM eliminates the need for glasses and contact lenses forever. The PCM practitioner in your area is offering you a free Precise Corneal Molding consultation. All you have to do is call 1-800-305-5030. The call is free, and the improved vision without glasses or contact lenses is well, priceless...." (Exhibit F)
(Short Video Promotion)

G. "Precise Corneal Molding Success Stories:
From the offices of J. Mason Hurt, O.D."

"'PCM is wonderful! I can see clearly now, even when Scuba Diving. Before PCM, I had Poor Vision. Yet with PCM, I went back to 20-20, without surgery. I am so excited that I tell everyone about the benefits of PCM.' Peggy Collins, College Co-Ordinator.
'PCM is like a Miracle. It's hard to believe I can see so well without glasses and without Surgery. I would recommend PCM to anyone who is Near-Sighted, Far-Sighted or has Astigmatism.' Sara Ann Nichols, Systems Analyst.
'Before PCM, my son Scott had to change glasses every six months. Yet after PCM, he could see 20-20 within one month.' Connie Braden, Housewife.
'Before PCM, I could hardly see my computer monitor, and for the last two years, I wore both contacts and glasses. After PCM, I can see clearly and I am very happy.' Steven Fensler, Computer Programmer."
(Exhibit G)

H. "Welcome to the PCM Team"

"....
PCM is virtually problem free, and there is no risk. It is safer than contact lens wear. Unlike surgery, there is no such thing as mistakes. Nothing that may be induced by molding cannot be undone and fixed. If illness or extenuating circumstances occur, this only delays for a short time the final success of PCM....

A safe alternative to RK surgery

In contrast to radial keratotomy surgery, which involves making incisions on the eye, PCM does not leave scar tissue which may cause vision glare at night or other side effects. PCM is also free of surgical complications or pain, and there is no disruption of vision as eyesight improves.

Saving children's vision

One of the most exciting uses for PCM is controlling myopia (nearsightedness) in children.
....PCM prevents this deteriorating vision in children by actually halting myopia in its tracks and even reversing it.

Results

Myopia (nearsightedness): PCM is highly effective in improving myopia. Mild to moderate degrees of myopia are corrected and higher degrees of myopia can be controlled to allow functional vision without lenses as well.
Astigmatism: PCM usually either eliminates or greatly reduces astigmatism to great functional clarity.
Hyperopia (farsightedness): Mild to moderate cases may be improved as well.

Natural vision improvement

...The procedure, which is also known as PCM, has provided corrective eye care to thousands of patients without the risks or complications associated with surgery.
...PCM utilizes a series of molds prescribed in progressive stages to gently reshape the cornea, similar to the way braces are used to straighten teeth.

The PCM procedure involves thorough examinations, lens changes and/or lens modifications as needed until desired results are achieved. The process can take from a few weeks to a few months or longer to complete, depending on the severity of the problem. The result is dramatically improved vision with retainer molds being worn on a limited basis, sometimes only a few nights a week while you are sleeping, to maintain the new shape of the cornea.

Safety

Four University research studies have shown corneal molding to be safe and effective, with no harmful side effects. These studies include:

University of Houston College of Optometry (5 years)
University of California at San Diego Medical School (7 years)
University of California at Berkeley College of Optometry (3 years)
Pacific University College of Optometry (5 years)....."
(Exhibit H) (Patient Handout)

9. Through the means described in paragraph eight, respondents have represented, expressly or by implication, that:

A. PCM ortho-k provides a cure for any refractive vision deficiency thereby permanently eliminating the need for all corrective eyewear, including eyeglasses and contact lenses.

B. All people can achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear PCM ortho-k devices occasionally or at night.

C. PCM ortho-k has been approved by the Federal Aviation Administration and all branches of the United States military for use in correcting refractive vision deficiencies.

D. Studies at the University of Houston College of Optometry (1976-77), University of California at San Diego Medical School (1980), University of California at Berkeley College of Optometry (1982-83), and Pacific University College of Optometry (1984), prove that PCM ortho-k is safe and effective in correcting nearsightedness, farsightedness, and astigmatism.

E. Testimonials from consumers appearing in the advertisements for respondents' PCM ortho-k services reflect the typical or ordinary experience of members of the public who receive those services, which experience is that respondents' PCM patients typically achieve 20/20 vision and no longer need corrective eyewear.

10. In truth and in fact,

A. PCM ortho-k does not provide a cure for any refractive vision deficiency thereby permanently eliminating the need for all corrective eyewear, including eyeglasses and contact lenses.

B. All people cannot achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear PCM ortho-k devices occasionally or at night.

C. PCM ortho-k has not been approved by the Federal Aviation Administration and all branches of the United States military for use in correcting refractive vision deficiencies.

D. Studies at the University of Houston College of Optometry (1976-77), University of California at San Diego Medical School (1980), University of California at Berkeley College of Optometry (1982-83), and Pacific University College of Optometry (1984), do not prove that PCM ortho-k is safe and effective in correcting nearsightedness, farsightedness, and astigmatism.

E. Testimonials from consumers appearing in the advertisements for respondents' PCM ortho-k services do not reflect the typical or ordinary experience of members of the public who receive those services, which experience is that respondents' PCM patients typically achieve 20/20 vision and no longer need corrective eyewear.

Therefore, the representations set forth in paragraph nine were, and are, false or misleading.

11. Through the means described in paragraph eight, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph nine A - B, at the time the representations were made.

12. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph nine A - B, at the time the representations were made. Therefore, the representation set forth in paragraph eleven was, and is, false or misleading.

13. Through the means described in paragraph eight, respondents have represented, expressly or by implication, that:

A. A significant number of people can achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear PCM ortho-k devices occasionally or at night.

B. All or most people will experience stabilized vision after only a few weeks or months of PCM ortho-k treatments.

C. PCM ortho-k prevents and reverses deteriorating nearsightedness in children.

D. PCM ortho-k is safer than contact lenswear.

E. PCM ortho-k is more effective than refractive surgical methods in eliminating nearsightedness, farsightedness, and all forms of astigmatism.

F. PCM ortho-k has helped thousands of people achieve normal vision.

14. Through the means described in paragraph eight, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made.

15. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made. Therefore, the representation set forth in paragraph fourteen was, and is, false or misleading.

16. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A



TALK AMERICA
Radio Network

## 21st Century Eyecare

Saturday 10 a.m. - 12 p.m. ET

It sounds too good to be true -- a safe, non-surgical alternative to restore clear vision safely, gently and permanently.

In a modest departure from ordinary talk radio, Talk America will air a new program featuring an emerging national network of eye doctors who are performing a new, non-evasive, non-surgical corrective vision procedure that reshapes the cornea, much lie braces straighten teeth It's called 21st Century Eyecare.

Over the past eight months, Dr. Hurt and co-host, Sam Cooper have produced *21st Century Eyecare*, a live call-in program airing on Memphis talk station, WMC. The phone lines have been jammed ever since. Why? Over 70% of their listeners are int erested in eye care -- and no one else is talking about it like they are.

Dr J. Mason Hurt, a Memphis-based optometrist, has developed a revolutionary new corrective eye procedure called Precise Corneal Molding (PCM for short), that will soon render glasses and contact lens obsolete.

Sam Cooper is a veteran broadcaster, having done over 1,000 radio and 600 TV interviews over the past two decades, Sam stumbled onto this procedure last summer and has been helping radio listeners discover the joy of visual freedom by co-hosting the p rogram ever since

Precise Corneal Molding is the result of merging technology and physiology PCM evolved from a procedure called "orthokeratology," clinically practiced for over thirty years Orthokeratology involves reshaping the cornea by fitting patients with a se ries of special hard contact lenses, each having a slightly different curve Orthokeratology was limited by the older technology of the lenses and the difficulty in precisely monitoring and controlling the reshaping process

Send Email Directly to Dr. Hurt and Sam Cooper

Home|How To Contact Us

WebMaster@TalkAmerica.com

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EXHIBIT B

# PRECISE CORNEAL MOLDING (PCM)

## YOUR CLEAREST CHOICE

## YOUR GREATEST FREEDOM

EXHIBIT B

EXHIBIT B

J. MASON HURT, O.D
PRECISE CORNEAL MOLDING
2865 SUMMER OAKS DRIVE
BARTLETT, TN 38134
(901) 382-7803

September 20, 1994

Dear Dr.

I have been Dr. Hurt's office and Business Manager since 1988. Since he began what is now called the I.C.O.K. procedure of Precise Corneal Molding (PCM) in November of 1992, I have helped Dr. Hurt develop the I.C.O.K. Office Management System to convert the highest percentage of PCM consultations into PCM patients for Precise Corneal Molding. Media Fund began doing our marketing three months ago and our sales have increased dramatically from $37,000.00 in June, $65,000.00 in July to $126,000.00 in August and we should exceed $150,000.00 in September.

I will be conducting a seminar for I.C.O.K. Business Managers and/or I.C.O.K. Doctor's Clinical Assistants in Memphis September 24th and 25th in conjunction with I.C.O.K. Society's Symposium. The $495.00 Seminar fee will include Video and I.C.O.K. Office Procedures Manual. I believe I can teach your Office Manger to get the same results that we helped Dr. Hurt achieve in August and I am sure you both would be proud to duplicate our $126,000.00 August income.

If you have a staff member who should attend please fax their reservation to me at (901) 385-1581

Thanks,

Millie C. Middleton
Dr. Hurt's I.C.O.K. Business Manager

EXHIBIT B

## PRECISE CORNEAL MOLDING

PRECISE CORNEAL MOLDING IS A PROCESS WHICH RESHAPES THE CORNEA OF THE EYE AND THEREBY REDUCES THE DEPENDENCE UPON EYE WEAR. THE PROCEDURE STARTED OVER THIRTY-EIGHT YEARS AGO AND HAS HAD REMARKABLE SUCCESS SINCE. EARLY ON ONLY OLD FASHIONED HARD CONTACT LENS MATERIAL WAS USED. THE INHERENT PROBLEMS ASSOCIATED WITH THAT PLASTIC PROLONGED THE PROCEDURE FOR UP TO TWO YEARS. BUT WITH THE ADVENT OF SPACE AGE POLYMERS AND COMPUTER ASSISTED LATHES. MOLDS AVAILABLE NOW CAN RESHAPE THE CORNEA IN ONLY A FRACTION OF THE TIME. IN MANY CASES, JUST A MATTER OF DAYS TO WEEKS FREES THE MAJORITY OF THE PATIENTS FROM THEIR DEPENDENCE UPON EYEGLASSES OR CONTACTS DURING DAYTIME HOURS.

THERE IS NO HOCUS-POCUS, SLIGHT OF HAND OR EXAGGERATION. THE PRINCIPAL UPON WHICH PRECISE CORNEAL MOLDING (PCM) IS BASED, IS QUITE SOUND AND SIMPLE. BASICALLY AN INDIVIDUAL REQUIRES SPECTACLES TO SEE IF THEIR CORNEA IS TOO FLAT, TOO STEEP OR OUT OF ROUND IN RELATION TO THE OTHER ELEMENTS OR PARTS OF THE EYE. THE CORNEA IS THE SOFT CLEAR WINDOW WHICH PASSES LIGHT INTO THE EYE. IT MAKES UP ABOUT TWO-THIRDS OF THE EYE'S TOTAL POWER TO FOCUS THE LIGHT PRECISELY ON THE RETINA, (RECEIVING SCREEN) IN THE BACK OF THE EYE. BY SLIGHT MODIFICATION IN THE SHAPE OF THE CORNEA, CLEAR FUNCTIONAL VISION MAY BE RESTORED TO THE INDIVIDUAL.

RECENTLY SEVERAL SURGICAL PROCEDURES HAVE BEEN DEVELOPED TO ATTEMPT TO ACCOMPLISH THE SAME PURPOSE. HOWEVER THEIR LIMITED SUCCESS HAS BEEN DUE TO THE EFFECTS OFF SCARRING, IRREGULAR HEALING AND MOST IMPORTANTLY, ITS TEMPORARY EFFECT SINCE THE CORNEA IS SOFT IT CONTINUES TO CHANGE SHAPE AS TIME GOES BY AND THE INDIVIDUAL PRESCRIPTION CONTINUES TO VARY LEADING TO MORE DEPENDENCE UPON EYE WEAR WITHIN MONTHS TO JUST A FEW YEARS. IN ADDITION, THE SURGICAL SCARS CAUSE SURFACE IRREGULARITIES ON THE CORNEA, RESULTING IN PERMANENT BLURRING THAT EVEN GLASSES OR CONTACTS CANNOT ELIMINATE MOLDING AVOIDS THOSE COMPLICATIONS SINCE THERE IS NOT INJURY TO ANY EYE TISSUE. THE SOFT CORNEA SIMPLY RESHAPES ITSELF TO FILL THE MOLD. THE MOLD IS SIMILAR TO A CONTACT LENS IN ITS APPEARANCE AND SENSATIONS UPON WEARING. THE MOLD IS WORN WHILE SLEEPING AND/OR WHILE AWAKE. THE PROCEDURE TAKES JUST HOURS IN MILD CASES TO A FEW MONTHS IN VERY DIFFICULT CASES TO REACH GOOD FUNCTIONAL VISION. THE MOLD IS WORN REGULARLY UNTIL THE BEST VISION

EXHIBIT B

IS ACHIEVED AND THE CORNEA IS ALLOWED TO STIFFEN IN ITS NEW SHAPE. AT THAT POINT THE MOLD WEARING IS GRADUALLY REDUCED UNTIL A MINIMAL WEAR TIME IS ESTABLISHED THAT MAINTAINS THAT SHAPE AND GOOD FUNCTIONAL VISION. THIS GUARANTEES CONTINUED CLARITY WITHOUT THE GRADUAL BLURRING THAT USUALLY ACCOMPANIES THE SURGERY. THEREFORE, THE CORNEA CAN EASILY BE FINE TUNED THE REST OF ONES LIFE BY MINOR MODIFICATION IN THE RETAINER MOLD

PCM IS NOT ONLY A GREAT ALTERNATIVE TO THE WEARING OF SPECTACLES OR CONTACT LENSES, BUT IT ALSO FREES THE INDIVIDUAL FROM THE DISTRACTIONS CAUSED BY PERSPIRATION, DUST, WIND, WEATHER, AND TEMPERATURE. THERE ARE NO MORE BLIND SPOTS CAUSED BY FRAME OR LENS EDGES. IT IS GREAT TO WEAR REGULAR FASHION SUNGLASSES, TO GET UP AT NIGHT OR IN THE MORNING AND SEE. TO GO SWIMMING AND SKIING, TO DRIVE IN A CONVERTIBLE WITH THE TOP DOWN, TO WORK IN THE DUST, GRASS, OR IN THE GARDEN, AND TO BE ABLE TO SEE IN CASES OF EMERGENCY. PCM OPENS NEW HORIZONS TO EVERYONE REGARDLESS OF AGE, OCCUPATION, OR ABILITY TO WEAR CONTACT LENSES IN THE PAST

PCM IS SAFE, RELIABLE, AND INEXPENSIVE. PCM GIVES YOU A CURE NOT A MAINTENANCE OF YOUR VISUAL HANDICAP. PCM IS THE BEST INVESTMENT OF YOUR TIME AND RESOURCES. YOU DESERVE SUCH FREEDOM AND CONVENIENCE. YOU ARE WORTH IT. CONSIDER PCM, TRY IT AND THEN STAND BY AND MARVEL AT THE SPLENDID RESULTS.

JMH 000309

## Patients See The Difference

"I shifted from soft contact lenses to PCM™ and I can see 20/20 when I take them off!" -- T.K.

"I have been through the program and I am very happy with the results. I'm taking my daughter in for Precise Corneal Molding™, too!" -- A.S.

"I am very happy with PCM™ and would recommend it with no reservation." -- D.M.

"I never realized how precious the gift of sight was until I underwent the PCM™ procedure." -- A.S.

### *Compare!*

PCM™ is a safe, gentle, affordable, non-surgical alternative for wearers of glasses.

| | Surgery | PCM™ |
|---|---|---|
| Age as a limiting factor | Yes | No |
| Reversibility | No | Yes |
| Loss of work time | Yes | No |
| Worsening of night vision | Yes | No |
| FAA and military approval | No | Yes |

## Find Out If PCM™ Is Right For You

Call for a *free* PCM™ consultation. Come in and view an informational video to help determine if you are a candidate for this procedure.

If PCM™ is determined to be an option for you, you too may be one of the many who are no longer dependent on glasses.

**Mid-South PCM™ Group, P.C.**
**J. Mason Hurt, O.D.**
**2865 Summer Oaks Drive**
**Bartlett, TN 38134**
**901/382-7803**
**800-947-4257**

# Precise Corneal Molding™ (PCM™)

Safe
Affordable
Gentle
Non-Surgical

Visual Freedom from glasses.

**Mid-South PCM™ Group, P.C.**
**J. Mason Hurt, O.D.**
**2865 Summer Oaks Drive**
**Bartlett, TN 38134**
**901/382-7803**
**800-947-4257**

JMH 000018

EXHIBIT C

## What is PCM™?

Imagine being able to easily read an alarm clock without your glasses, see street signs clearly, or participate in sports without lenses of any kind . . . These are just a few of the freedoms people are enjoying through Precise Corneal Molding™ (PCM™)

PCM™ is a safe, gentle, affordable, and non-surgical procedure that dramatically improves natural vision by reshaping the front of the eye, the cornea, with scientifically shaped molds. Because the procedure is non-invasive, PCM™ has provided thousands of patients with better vision without the risks or complications of surgery

Nearsightedness, farsightedness and astigmatism occur when light rays entering the eye through the cornea focus incorrectly. PCM™ utilizes a series of prescription eye molds to reshape the cornea much like orthodontists use braces to straighten teeth. The result is a gradual correction of vision, enabling patients to see clearly throughout the procedure.

The PCM™ procedure involves a series of thorough examinations by Dr. J. Mason Hurt, recognized in the medical community as an expert in PCM™, and a series of mold modifications. The benefits are realized in weeks or months, depending on the severity of vision problems. Retainer molds will be used on a limited basis to maintain the new shape of the cornea

Since 1962, PCM™ and its predecessor, Orthokeratology, have been used to help pilots, athletes and others requiring unaided vision. Now, new research developments such as computerized corneal topography and new mold designs and materials have established PCM™ as the eye care trend of the future.

## The Safest Option

In contrast to Radial Keratotomy and laser surgery, PCM™ does not require injury to the eye, resulting in glare-inducing scars. There is also no disruption of vision as eyesight improves.

JMH 000019

## PCM™ for Children

One of the most exciting uses for PCM™ is controlling nearsightedness in children. Unfortunately, nearsightedness is a progressive condition, which is why 75% of patients who are nearsighted must periodically increase their prescription. For example, only 1% of 8-year-olds are nearsighted, while over 30% of the general population are nearsighted. PCM™ prevents the increasing vision and even reverses it

## Proven Safe Results

PCM™ is highly effective in correcting nearsightedness, farsightedness and astigmatism. Even severe cases find great benefit from PCM™

University research studies have shown corneal molding to be safe and effective. These studies include the University of Houston College of Optometry (5 years), University of California at San Diego Medical School (7 years), University of California at Berkeley College of Optometry (3 years), and Pacific University College of Optometry (5 years)

EXHIBIT D

**OFFICIAL TRANSCRIPT PROCEEDING**

**FEDERAL TRADE COMMISSION**

| | |
|---|---|
| MATTER NO. | 9623279 |
| TITLE | MID-SOUTH PCM GROUP, et al. |
| DATE | RECORDED: APRIL 26, 1995<br>TRANSCRIBED: NOVEMBER 28, 1996<br>CORRECTED: JANUARY 7, 1997 |
| PAGES | 1 THROUGH 23 |

PRECISE CORNEAL MOLDING INFOMERCIAL

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**FOR THE RECORD, INC.**
**603 POST OFFICE ROAD, SUITE 309**
**WALDORF, MARYLAND 20602**
**(301)870-8025**

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EXHIBIT D

EXHIBIT D



FEDERAL TRADE COMMISSION

In the Matter of: )
Mid-South PCM Group, et al. ) Matter No. 9623279
----------)

**VIDEOTAPE TRANSCRIPTION**

RECORDED: APRIL 26, 1995

TRANSCRIBED: NOVEMBER 28, 1996

EXHIBIT D



PROCEEDINGS

- - - - -

MR. LINDSEY: Over 190 million men, women and children in America are lifetime victims of poor vision. Millions of Americans are chained to the use of glasses and contact lenses. It alters life-styles, is expensive, and vision only gets worse.

There is a solution today. If you are one of the 190 million Americans, this show is for you. Precise corneal molding, three words that will change the way you see the world without glasses or contact lenses.

In the next 30 minutes, you will be introduced to a gentle, nonsurgical, affordable procedure that will make glasses and contact lenses a thing of the past in your life. Precise corneal molding, three words that will literally change your life.

Thousands of people all over America are experiencing the gift of improved vision. From 8 to 80, precise corneal molding truly is the medical eyecare breakthrough of the century.

NARRATOR: The gift of sight, a sense given to all human beings, yet more than 75 percent of Americans have vision disorders that require prescription glasses or contact lenses to correct. They do bring improved vision, but with every prescription change, the vision grows weaker and

EXHIBIT D



weaker, not stronger.

To eliminate vision disorders, surgical procedures have been developed and introduced but with limited results. In the 1960's, before the popularity of soft contact lenses, an ortho-keratology procedure was developed that could actually reshape the cornea of the eye and caused improved vision for a limited time.

The procedure was accepted by the FAA, a department of the Federal Government that regulates the airline industry. The process required pilots to wear contact lenses that allowed the eye to focus properly for several hours. Pilots were only required to have functional vision during flight time, but the results of the procedure proved very promising.

In 1992, Dr. J. Mason Hurt, an optometrist, perfected a process called precise corneal molding or PCM. With PCM, patients who had previously worn glasses or contact lenses were able to see without the use of either and without surgery. Here is why:

DR. HURT: Corneal molding is very safe and effective, and I would like to show you why. The cornea, the clear window that we see through, is very soft and is subject to change. It changes its shape on a very regular basis.

A person is nearsighted when the distance from here to here is too long for the type of lens they've got inside

EXHIBIT D



their eye. A person is farsighted, conversely, when the distance is too short for the size of lens they have inside the eye. A person has astigmatism when one of these curves isn't perfectly round. In our molding procedure, we can counter these problems in a safe and effective way simply by reshaping the curve on this cornea in a very safe and natural way.

The cornea wants to change in shape. Now we just guide it to the shape we would like for it to have, and we do that by building a mold which will rest in the zone where we are having our shape problems, and we can reshape this cornea in a fashion very similar to wearing of contact lenses in a safe, nonsurgical, noninvasive technique that we call precise corneal molding.

MR. FENSLER: It really does. I was getting to the place where I could hardly see my monitor anymore, where if I had to stand back and use someone else's monitor, I couldn't see it at all. And for the past two years I had been wearing reading glasses along with my contacts so that I could read pages, and then I was getting very tired.

I've been on molds for seven months, and I don't use my reading glasses anymore at all, either with my contacts or without them. I can see everything at work I want to see. It just makes life easier, makes it go smoother.

MS. COLLINS: You can see. It does improve your

EXHIBIT D



vision. If for some reason you get sick and you are not able to wear your contacts, then it's no problem, you can start the procedure over again, there is no hassle, there is no surgery, there is no blood, there is no nothing like that. Just little contacts in your eyes, you sleep with them at night, and it's a great insomnia pill. I recommend it.

DR. SHUM: I am very enthusiastic about the procedure. I recommend it to my patients daily, many, many times a day. I hand out pamphlets on the subject. I explain, I take time, I talk to the patients about this, and it is a wonderful procedure, and it works very well.

MS. NICHOLS: The one day that I really realized that this was doing some good, my son came in and had a T-shirt on. I didn't have my glasses on, and I could read his T-shirt, and it was like a miracle. I couldn't believe I could read his T-shirt. So, I just went around reading things. Now I can watch TV without my lenses in, without the molds in, and before I couldn't even find the TV.

MS. BRADEN: Scott had broken his glasses at school, and we came to get his eyes checked, and his eyes had gotten so bad in just a few months that I was told that he would have to have glasses changed every six months. So, we started with the contacts, and within one week, he could see 20 20.

MR. DARFELL: For anyone who has problems seeing, I

## EXHIBIT D



would recommend it to all my friends that wear glasses. They need to come here and get this done. It's just great to be able to take contacts out and still be able to see.

NARRATOR: You were not born to wear glasses and contact lenses. We were all designed to have clear vision. When the design needs correction, now there is precise corneal molding, a safe, gentle, nonsurgical method of correcting nearsightedness and farsightedness. PCM can also eliminate astigmatism and restore good, functional vision without the use of contacts or glasses.

The PCM practitioner in your area is offering you a free precise corneal molding consultation. All you have to do is call 1-800-846-2020. The call is free, and the improved vision without glasses or contact lenses is, well, priceless.

Call now, 1-800-846-2020, and schedule your PCM consultation with a PCM practitioner in your area. That's 1-800-846-2020. Precise corneal molding, the clear choice for the 21st century.

MS. RICHARDS: I come from a long line of four-eyes. We all have glasses. I got my little blue-pointed glasses when I was in the fifth grade. I hated them then, and I have hated glasses ever since. So, I opted for contacts as soon as they were available, but they were the hard ones. They were torture. And I wore them just out of pure vanity.

EXHIBIT D



because I hated them, too, but I didn't want to wear glasses.

Certainly like most people, I would never want my eyes to be touched in a surgical way, and this gives you an option that you don't have to do that. Don't be afraid to give up your soft lenses, and don't be afraid to try hard lenses, which is what these molds are, or gas-permeable lenses, because they are not uncomfortable at all, they are very comfortable, and you will be able to see much better.

MS. ROBBINS: I would highly recommend it to anyone who is considering it. I have a brother who is almost legally blind, and he was like, yeah, okay, I am going to wait to see what happens to you first, because you know, if I am going to have to wear contacts, I would just assume wear, you know, what I have got, but he doesn't realize that when he gets up in the morning, if he doesn't put his glasses on, he can't see, and with this, it wouldn't -- I have just been trying to talk him into going in and checking it out, because it would make a big impact with him, and it is so wonderful not having to wear glasses.

MS. POSEY: Dr. Hurt told me about it the end of February, and I immediately signed up. It has been almost like a miracle, really, because my vision had just gotten so bad, and I couldn't wear contacts anymore, didn't like wearing glasses, wasn't wanting to have any type of surgery

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EXHIBIT D



and I found out about this, and I thought, Oh, sign me up.

The contacts were nice. This is going to be a wonderful day, not having to wear anything at all. Knowing that my vision is going to be 20/20 all the time is just really exciting.

I wore the molds, started really wearing them on Saturday morning, and within 24 hours, I could tell that my vision had changed. It was amazing. There was a big jump after wearing them for about three weeks, to take the molds out, and all of a sudden, to see that there was writing on the television or to be able to see outside the window, the cars, and know that there were things out there. I had never dreamed of not having glasses or contacts in my life, and now I can.

NARRATOR: You were not born to wear glasses or contact lenses. We were all designed to have clear vision. When the design needs correction, now there is precise corneal molding, a safe, gentle, nonsurgical method of correcting nearsightedness and farsightedness. PCM can also eliminate astigmatism and restore good, functional vision without the use of contacts or glasses.

The PCM practitioner in your area is offering you a free precise corneal molding consultation. All you have to do is call 1-800-946-2020. The call is free, and the improved vision without glasses or contact lenses is, well,

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priceless.

Call now, 1-800-846-2020, and schedule your PCM consultation with a PCM practitioner in your area. That's 1-800-846-2020. Precise corneal molding, the clear choice for the 21st Century.

MS. GREENE: I heard about this procedure, and it really sounded too good to be true. But I am so excited about it now, because I've probably had the procedure maybe six weeks, and already, within six weeks, I can drive my van without any corrective lenses whatsoever, and it's going to be so exciting to water ski this summer and be able to see the people in the boat, and there are just so many things I have to look forward to.

NARRATOR: As a precise corneal molding patient, you will receive the advantage of the most modern equipment in the eyecare industry. The corneal topography system used by PCM practitioners produces a computerized map of your cornea that allows your doctor to prescribe the perfect mold for you, a mold that will be comfortable and very effective in reshaping your cornea and allowing you good, functional vision without glasses or contact lenses.

DR. HURT: This is all a map of your eye. I know it looks like the moon to you, but this is a picture of the eye. If you look at this map, the darker red -- imagine that being a mountain. That's the tallest part. This is your pu-

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EXHIBIT D



are nearsighted, if you can see those areas of red and pink.

What we are going to do with this molding process is flatten this portion of the eye, and as we do, we are going to tend to see the red, the oranges move down this way, and this is where we are going to find that you will end up with that bifocal benefit. The colors are going to gradually change as your eye flattens out up and through here to more the greens and the blues, and you will see this as the process continues over the coming months.

This is our starting place. This little X right here is your line of sight. That's what you're seeing through. If you notice on this map, you will notice that figure 8 where you have got a green bowtie this way and an orange bowtie this way, this is your astigmatism. And so you notice, it's all in the center, so if you allow this mold to rest where we want it to and as we keep it centered, all of this will mold away.

So, we are going to be able to mold away your astigmatism as well as your nearsightedness and as we end up with this pink what I call a smiley face down here, then you will have your bifocal, as well, okay? So, we'll start wearing the lenses, and I will have them designed this week, and it usually takes five business days to get them in, and then you'll start wearing them, and then in one week, we will check you, and then we will map you out again, so we can

EXHIBIT D



start plotting out the changes that have taken place. Great, you did wonderful.

NARRATOR: PCM is being heralded as the greatest scientific breakthrough in the eyecare industry this century. By simply wearing the prescribed corneal molds only a few hours a day, you can eliminate the need to wear glasses or contact lenses and actually correct nearsightedness, farsightedness and astigmatism without surgery.

You were not born to wear glasses or contact lenses. We were all designed to have clear vision. When the design needs correction, now there is precise corneal molding, a safe, gentle, nonsurgical method of correcting nearsightedness and farsightedness. PCM can also eliminate astigmatism and restore good, functional vision without the use of contacts or glasses.

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MS. ABERNATHY: It's great. It includes every area of your life. You can see better, there is no -- you know,

## EXHIBIT D



no mess involved with it, and just the thought of not having to wear contacts or glasses or anything by the time I get done with this is just absolutely wonderful.

MS. POSEY: Number one, it is wonderful to be able to wake up in the morning and open my eyes and to see everything around me, with no contacts in, nothing in, just to be able to open them up and to see, or to read things without looking for my glasses or looking for things.

Number two, there is such security knowing financially that later in life I am not going to have to buy more glasses, change my prescriptions, get more prescription sunglasses, I am not going to have to lose a contact and find it or anything like that. I know that my vision, I'm going to be able to see. And that is just wonderful.

NARRATOR: PCM is not a wonder drug or a surgical procedure. It is a high-tech scientific procedure that can work for most people who require glasses or contact lenses. By gently reshaping the cornea of your eye, the PCM process can restore even difficult cases to good, functional vision, even if you've worn glasses all your live.

MRS. FENSLER: Actually Dan was the first to use it. He even got to do it before his dad, and then his dad started, and then I was the last, but we were really happy with it, and -- and I'm real impressed with the -- the way I can see now compared to, you know, even a month ago.

EXHIBIT D



MS. ROBBINS: It's definitely worth the money that you spend on it. It will change your life. You won't have to deal with glasses, you won't have to deal with contacts, you won't have to deal with not being able to see. It's just -- it's so nice not to be able to have to put those glasses on at all.

MS. MIDDLETON: For me to be able to be a small part of what has taken -- what this process has done for just the basic general public of Bartlett. So, I -- there is over -- Dr. Hurt has done over three hundred and sixty something patients, and each and every one of those lives have been changed tremendously.

MS. STREEFF: The biggest benefit of CKR is being able to see, is getting out of bed and you can see, is getting in the car, and you can see everything, is walking in the rain, and your glasses don't get wet. That's the biggest benefit, that freedom of not having to remember your glasses, not having to remember your contacts, not having to remember your solution, not having your eyes irritated. So -- and it's amazing. I can't get over it.

MR. GARNER: I started with the procedure in March, and I noticed very quickly that this procedure was going to work for me and work well. On a scale of 1 to 10, as far as satisfaction, I'm way above 10, probably 15 to 20. I'm very -- I have been very pleased with the results that I have had

EXHIBIT D



and the -- and the success that will continue.

I have still got a way to go, but at this point, there is no comparison from where I started to where I am now only after about four and a half months.

MS. BENGAL: This is great. I think I was around 20/1000 when I started. I am down to 20/70. If I -- if I never get any better than I am now, I'm happy, but I know that I will.

NARRATOR: Don't suffer through the agony of wearing contact lenses that may cause irritation to your eyes. No longer do you have to be dependent on glasses that become thicker and stronger with each new prescription.

Now, through precise corneal molding, you can see clearly day or night and continue to see clearly for the rest of your life, without depending on glasses or contact lenses.

You were not born to wear glasses or contact lenses. We were all designed to have clear vision. When the design needs correction, now there is precise corneal molding, a safe, gentle, nonsurgical method of correcting nearsightedness and farsightedness. PCM can also eliminate astigmatism and restore good, functional vision without the use of contacts or glasses.

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EXHIBIT D



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MS. STRANY: I started wearing my molds January 11th, and by the end of the first eight hours of wear, my vision had improved that quickly. I could not even wear my glasses after eight hours.

MS. GREENE: I am very excited about this procedure, because it will work for children, and I have four kids of my own. And for them to not have to go through what I went through in the third grade, if any of them for any reason has a problem and needs corrective lenses, they will definitely get this procedure.

MS. GRAMMER: I recommend it to everyone. Nellie, his office manager gave me brochures, and I keep it in our office, and I tell everybody, because even with small children that wear their glasses, people don't know how bad or how embarrassing it is to wear glasses that are like coke bottles and can't see, and until you experience it, you don't know, and anyone I see that has to wear contacts and has [illegible] of their allergies or have their glasses I

EXHIBIT D



really want to talk about it.

MR. GARNER: My recommendation is I wish that there had been a procedure like this when I was a child and could have prevented my vision from ever getting as bad as it did, and I think that's -- I think it's a wonderful opportunity for children, especially children who are active, play sports. Because I unfortunately had to wear the glasses throughout all that, and it was terribly unpleasant at times.

MS. BENGAL: I have been doing this for about a year now, and I drive -- one of my hobbies is cooking. I cook without glasses, which was never a possibility before. I do everything. If for some reason I need my glasses, I have to hunt them up now. They are either in the car, because I leave them in the car sometimes, just in case, but mostly, I don't wear, you know, anything. I use the molds at night and a little bit during the day, but not much.

MS. COLLINS: About six years ago, my husband and I started scuba diving, and you can't wear glasses underneath your scuba diving mask, and you can wear contacts, but if your mask floods, then the contacts wash out, and you have lost them. And you can get prescription masks, but you couldn't for my model of mask.

So, after so many years of him saying, See, didn't you see that fish down there, and I didn't, I decided

EXHIBIT D



something needed to be done, and Dr. Hurt had a solution.

NARRATOR: You were not born to wear glasses or contact lenses. We were all designed to have clear vision. When the design needs correction, now there is precise corneal molding, a safe, gentle, nonsurgical method of correcting nearsightedness and farsightedness. PCM can also eliminate astigmatism and restore good, functional vision without the use of contacts or glasses.

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MS. BRADEN: It's nice to know that he can go to school and I don't have to worry about him forgetting his glasses or anything, because I know that he can see when he gets up in the morning.

MR. FENSLER: I would definitely recommend this to other people. This is a great way to go. There is no worry about -- it's so invasive that maybe I'll never see again. There is no worry about if I get dirt inside the eye or is

EXHIBIT D



going to pop my eyeball kind of thing, as somebody -- somebody said as so many stories have been about laser surgery. I'm really anxious to see that it works for me all the time, and I would always recommend it to anybody. There is just no doubt in my mind, it's the way to go. It's well worth it.

MS. ROBBINS: It is definitely worth the money that you spend on it. It -- it will change your life, and you won't have to deal with glasses, you won't have to deal with contacts, you won't have to deal with not being able to see. It's just -- it's so nice not to be able to have to put those glasses on at all.

NARRATOR: The optometrists in your area have undergone specialized training for prescribing and treating your vision disorder through precise corneal molding. There are trained PCM practitioners all over America, and through the International COK Society, a network of doctors confer with each other to ensure you, the PCM patient, a complete bank of professional knowledge and experience in the PCM process is available.

The precise corneal molding procedure is designed to become the procedure of choice for people who want to eliminate the need to wear glasses or contact lenses. It is the choice of the 21st Century. Safe, gentle, nonsurgical PCM is also an affordable procedure and financing is

503

Complaint

EXHIBIT D



available in most cases.

If you hate the daily dependency of glasses or contacts, just to see to read a newspaper or a street sign, if you're tired of spending hours with messy contact solutions, and if you want the experience of a nonsurgical correcting procedure that will continue to allow you functional vision for the rest of your life, precise corneal molding is the answer, and now is the time.

DR. HURT: Precise corneal molding is becoming the procedure of choice all across the country. No longer do you have to be satisfied with just getting by or being visually handicapped. It is now the best that science has to offer. You do not have to be content with the things the way they are. This is the closest thing to a cure that science has to offer.

You can enjoy the freedom of seeing again without the use of glasses or contact lenses. No more wearing glasses, no more wearing contacts. The opportunity of seeing well all the time without being dependent upon these is now a reality and not a dream. This is the best that science can offer, and we're here to help you do that.

And our pledge to you is that you will have the best that we can give you, the best care, the best service and the best vision. It will give you the opportunity to enjoy the freedom that you deserve and we will work hard to see that

EXHIBIT D



you get that freedom and that you enjoy the quality of life that you should have.

MR. LINDSEY: Precise corneal molding, truly three words that will change the way you see the world today. The doctor and I both invite you to pick up the phone and call the 800 number on the screen. Your eyesight is one of your most important possessions. Precise corneal molding is nonsurgical, safe, gentle and affordable.

The call is free, the evaluation is free, and you, too, can enjoy the freedom from glasses and contact lenses forever. Make this important call now. Our operators are standing by.

Thank you.

MS. STRANY: I was astounded. I was so happy, and now, I'm not quite through with the process, but for me to be able to function in my home and be able to see, to get up in the middle of the night and be able to see and walk around the house and not have to reach for my glasses.

MS. RICHARDS: Don't be afraid to give up your soft lenses, and don't be afraid to try hard lenses, which is what these molds are, or gas-permeable lenses, because they are not uncomfortable at all, they are very comfortable, and you will be able to see much better.

MS. STREEFF: There are so many good things that happen to you because of CKR. I would recommend it to

EXHIBIT D



anybody who needs glasses.

MS. POSEY: Oh, I would definitely rate this a 10 on a scale of 1 to 10, 10-plus, because it has been so easy, it has happened so quick, the change. It just -- it happens overnight. All I did was wear them and see it happen tonight, to my body, to my eyes, and my eyes -- my vision is here to stay for the rest of my life. It is worth everything.

"ICOKS, International Cooperative Ortho-Keratectomy Society, 1-800-846-2020, ICOKS, Inc., Memphis, Tennessee, 1994."

EXHIBIT D



C E R T I F I C A T I O N O F R E P O R T E R

MATTER NUMBER: 9623279

CASE TITLE: MID-SOUTH PCM GROUP, et al.

TRANSCRIPTION DATE: 11/28/96

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 1/7/97

Susanne Tate

Susanne Q. Tate

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Sara J. Vance

Sara J. Vance

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

EXHIBIT E

## 60 Sec Radio Commercial
## (Use High Energy Enthusiastic Voice)
## One Spot Female and One Spot Male (Rotate)

YOU WERE NOT BORN TO WEAR GLASSES OR CONTACTS. ALL OF US WERE DESIGNED TO HAVE CLEAR VISION. AND NOW, WHEN THE DESIGN NEEDS CORRECTION, THERE'S *PRECISE CORNEAL MOLDING*. *PRECISE CORNEAL MOLDING* IS A SAFE, GENTLE, NON-SURGICAL METHOD OF CORRECTING NEARSIGHTEDNESS AND FARSIGHTEDNESS THAT WORKS !! IT CAN ALSO ELMINATE ASTIGMATISM AND RESTORE GOOD FUNCTIONAL VISION WITHOUT THE USE OF GLASSES.

THE P-C-M- PRACTIONER IN YOUR AREA IS OFFERING A FREE CORNEAL TOPOGRAPHY CONSULTATION SO YOU CAN SEE HOW P-C-M CAN WORK FOR YOU! ALL YOU HAVE TO DO IS CALL 1-800-846-2-0-2-0 THAT'S 1-800-846-TWENTY-TWENTY!! THE CALL IS FREE AND THE IMPROVED VISION WITHOUT GLASSES IS. . ..[illegible] WELL . . . .PRICELESS

CALL NOW . . . 1-800-846-2-0-2-0 . . . AND SCHEDULE YOUR CORNEAL TOPOGRAPHY CONSULTATION WITH THE P-C-M PRACTITIONER IN YOUR AREA. THAT'S 1-800-846-2-0-2-0 . . .THAT'S 1-800-846-TWENTY-TWENTY

PRECISE CORNEAL MOLDING. THE CLEAR CHOICE, FOR THE TWENTY-FIRST CENTURY. CALL FOR THE P-C-M PRACTITIONER IN YOUR AREA . . . . 1-800-846-TWENTY-TWENTY.

EXHIBIT F

**OFFICIAL TRANSCRIPT PROCEEDING**

**FEDERAL TRADE COMMISSION**

| | |
|---|---|
| MATTER NO. | 9623279 |
| TITLE | MID-SOUTH PCM GROUP, et al. |
| DATE | RECORDED: UNKNOWN<br>TRANSCRIBED: NOVEMBER 28, 1996<br>CORRECTED: JANUARY 7, 1997 |
| PAGES | 1 THROUGH 7 |

PRECISE CORNEAL MOLDING INFOMERCIAL

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**FOR THE RECORD, INC.**
**603 POST OFFICE ROAD, SUITE 309**
**WALDORF, MARYLAND 20602**
**(301)870-8025**

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EXHIBIT F



FEDERAL TRADE COMMISSION

In the Matter of: )
Mid-South PCM Group, et al. ) Matter No. 9623279
----------)

**VIDEOTAPE TRANSCRIPTION**

RECORDED: UNKNOWN

TRANSCRIBED: NOVEMBER 28, 1996

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EXHIBIT F



P R O C E E D I N G S

- - - - -

NARRATOR: Thousands of men, women and children all over the country are experiencing the gift of improved vision without glasses or contact lenses. Precise corneal molding, three words that will change the way you see the world. Precise corneal molding is a safe, gentle, nonsurgical, affordable procedure that corrects nearsightedness and farsightedness.

PCM eliminates the need for glasses and contact lenses forever. The PCM practitioner in your area is offering you a free precise corneal molding consultation. All you have to do is call 1-800-305-5030. The call is free, and the improved vision without glasses or contact lenses is, well, priceless.

Call 1-800-305-5030 and schedule your free PCM consultation with the PCM practitioner in your area. That's 1-800-305-5030. Three words that will literally change the way you see the world, precise corneal molding, the clear choice for the 21st Century.

"Client, L-3 Media Marketing; title, Precise Corneal Molding; date, 10/8/94; agency, Direct PROMO; length 90; Creative Resources, Inc., (615) 899-6942."

MR. LINDSEY: Precise corneal molding, three words that will literally change your life. Thousands of people

EXHIBIT F



all over America are experiencing the gift of improved vision. From 8 to 80, precise corneal molding truly is the medical eyecare breakthrough of the century.

NARRATOR: You were not born to wear glasses or contact lenses. We were all designed to have clear vision. When the design needs correction, now there is precise corneal molding, a safe, gentle, nonsurgical method of correcting nearsightedness and farsightedness. PCM can also eliminate astigmatism and restore good, functional vision without the use of contacts or glasses.

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MR. LINDSEY: Precise corneal molding, truly three words that will change the way you see the world today. Your eyesight is one of your most important possessions.

"Client, L-3 Media Marketing; title, Precise Corneal Molding; date, 10/8/94; agency, Direct PROMO; length 120; Creative Resources, Inc., '615' 889-6940."

NARRATOR: Precise corneal molding, three words that

EXHIBIT F



will literally change your life. Thousands of people all over America are experiencing the gift of improved vision. From 8 to 80, precise corneal molding truly is the medical eyecare breakthrough of this century.

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MR. LINDSEY: Precise corneal molding, truly three words that will change the way you see the world today. The doctor and I both invite you to pick up the phone and call the 800 number on the screen. Your eyesight is one of your

EXHIBIT F



most important possessions. Precise corneal molding is nonsurgical, safe, gentle and affordable.

The call is free, the evaluation is free, and you, too, can enjoy the freedom from glasses and contact lenses forever. Make this important call now. Our operators are standing by.

Thank you.

**(Whereupon, the videotape was concluded.)**

EXHIBIT F



C E R T I F I C A T I O N O F R E P O R T E R

MATTER NUMBER: 9623279

CASE TITLE: MID-SOUTH PCM GROUP, et al.

TRANSCRIPTION DATE: NOVEMBER 28, 1996

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DATED: 1/7/97

Susanne Q. Tate

Susanne Q. Tate

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Sara Vance

Sara Vance

For The Record, Inc.
Waldorf, Maryland
[illegible]

EXHIBIT G

# PRECISE CORNEAL MOLDING SUCCESS STORIES

## From the office of J. Mason Hurt, O.D.

2865 Summer Oaks Drive
Memphis, Tennessee 38134
(901) 382-7803

*"PCM is Wonderful! I can see clearly now, even when Scuba Diving. Before PCM, I had Poor Vision. Yet with PCM, I went back to 20-20, without surgery. I am so excited that I tell everyone about the benefits of PCM."*

Peggy Collins, College Co-Ordinator

*"PCM is like a Miracle. It's hard to believe I can see so well without glasses and without Surgery. I would recommend PCM to anyone who is Near-Sighted, Far-Sighted or has Astigmatism"*

Sara Ann Nichols, Systems Analyst

*"Before PCM, my son Scott had to change glasses every six months. Yet after PCM, he could see 20-20 within one month."*

Connie Braden, Housewife

*"Before PCM, I could hardly see my computer monitor, and for the last two years, I wore both Contacts and Glasses. After PCM, I can see clearly and I am very happy."*

Steven Fensler, Computer Programmer

EXHIBIT G

JMH 000032

EXHIBIT H

PCM™

PRECISE CORNEAL MOLDING™

# MID SOUTH PCM GROUP, P.C.

J. Mason Hurt, O.D.
2865 Summer Oaks Drive
Bartlett, TN 38134
901/382-7803

EXHIBIT H

JMH 000279

ATTACHMENT 9 (a)(3)

ICOKS

Member of the ICOKS
Dedicated to the training of PCM™ practitioners

EXHIBIT H

## WELCOME TO THE PCM TEAM!

You have made one of the most important decisions of your life, and you will see great improvement in your ability to see unaided and in your visual freedom. Our goal is to provide you with the best vision that is possible for you. Perfection cannot be guaranteed, but we strive for excellence and optimal visual clarity. You are important to us, and so is the success of PCM.

Maximum success depends upon excellent teamwork. My staff and I will utilize the best techniques and materials, along with extensive experience, to bring our patients to the desired goal. It is crucial that you follow all instructions to the letter. You must maintain regular scheduled appointments, a good line of communication, and patience.

Everyone is different and each person responds differently. Do not expect to use a limited number of molds. Our pledge is to accomplish our goal of best functional vision in the shortest time possible, with the least number of molds necessary. It may take one pair or many, but be assured that it will be the least needed for your case.

PCM is virtually problem free, and there is no risk. It is safer than contact lens wear. Unlike surgery, there is no such thing as mistakes. Nothing that may be induced by molding cannot be undone and fixed. If illness or extenuating circumstances occur, this only delays for a short time the final success of PCM.

We are glad that you have joined the PCM team. Now prepare yourself for the results you are soon to see.

J. Mason Hurt, O.D.

JMH 000230

EXHIBIT H

## A SAFE ALTERNATIVE TO RK SURGERY

In contrast to radial keratotomy surgery, which involves making incisions on the eye, PCM does not leave scar tissue which may cause vision glare at night or other side effects. PCM is also free of surgical complications or pain, and there is no disruption of vision as eyesight improves.

## SAVING CHILDREN'S VISION

One of the most exciting uses for PCM is controlling myopia (nearsightedness) in children.

Unfortunately, nearsightedness is a progressive disease, which is why 75% of the nearsighted population have to periodically increase their prescription. As years pass, from elementary school to college and later life, a person's vision gradually worsens. For instance, only 4% of 8 year olds are nearsighted, while over 30% of the general population is nearsighted. PCM prevents this deteriorating vision in children by actually halting myopia in its tracks and even reversing it.

### RESULTS

**Myopia (nearsightedness):** PCM is highly effective in improving myopia. Mild to moderate degrees of myopia are corrected and higher degrees of myopia can be controlled to allow functional vision without lenses as well.

**Astigmatism:** PCM usually either eliminates or greatly reduces astigmatism to great functional clarity.

**Hyperopia (farsightedness):** Mild to moderate cases may be improved as well.

EXHIBIT H

## NATURAL VISION IMPROVEMENT

Imagine being able to easily read the alarm clock without your glasses, see street signs clearly, or participate in sports without lenses of any kind. These are just a few of the ways people's lives are changing after undergoing the procedure known as PCM.

PCM is a non-invasive procedure that dramatically improves natural vision by reshaping the front curvature of the eye (called the cornea) with specially designed molds. The procedure, which is also known as PCM, has provided corrective eye care to thousands of patients without the risks or complications associated with surgery.

Visual defects known as nearsightedness (myopia), farsightedness (hyperopia), and astigmatism occur when light rays entering the cornea focus incorrectly, producing blurred vision. Often by changing the shape of the cornea the defect can be resolved. PCM utilizes a series of molds prescribed in progressive stages to gently reshape the cornea, similar to the way braces are used to straighten teeth. The molds consist of a highly oxygen permeable material with a special design that encourages the pliable tissue of the cornea to conform to the corrective curvature of the lens. The changes are so gradual that the patient enjoys clear comfortable vision at all times.

The PCM procedure involves thorough examinations, lens changes and/or lens modifications as needed until desired results are achieved. The process can take from a few weeks to a few months or longer to complete, depending on the severity of the problem. The result is dramatically improved vision with retainer molds being worn on a limited basis, sometimes only a few nights a week while you are sleeping, to maintain the new shape of the cornea.

## SAFETY

Four University research studies have shown corneal molding to be safe and effective, with no harmful side effects. These studies include:

University of Houston College of Optometry (5 years)

University of California at San Diego Medical School (7 years)

University of California at Berkeley College of Optometry (3 years)

Pacific University College of Optometry (5 years)

EXHIBIT H

## I JUST RECEIVED MY FIRST SET OF MOLDS . . . NOW WHAT.

The first three days will be the most trying of your new journey. Since the molds are likely to move more the first several days, you will find improved comfort when the molds tighten a little. The body will have to adjust to a new appliance, so you will notice that you will not tear as well as you normally do, therefore frequent lubrication will be necessary.

Should you find that the molds displace during waking hours or upon rising, just remove them and reinsert them. Dryness, or molds that you have outgrown, may shift vertically or horizontally and cause some temporary blurriness upon removal of the molds. If this happens to you, reinsert the molds for two hours and then remove.

Upon rising, always allow the eyes to moisten with tears and lubricants before you try to remove them. Should you not be able to remove the molds, you may use the contact lens remover to gently lift an edge up to break the vacuum. Should this fail, feel free to call the number provided. Irritation upon cleaning and lubricating may indicate sensitivity to the chemicals. If this occurs, please call for a change in care regimen.

**Pain, excessive redness and discharge are not typical; please call.** Even though the molds are not responsible, your eye may not recover properly if the molds are continued. Please call and return to the office for evaluation.

To ensure the greatest opportunity of success, it is essential to maintain the wear schedule that has been recommended, as well as returning to the clinic for your scheduled appointment.

Patience, compliance, time and our professional care will bring you the results you desire.

CMH 000034

EXHIBIT H

## A NEW LOOK ON LIFE

PCM enables people to participate in activities that were previously difficult or even impossible without lenses, such as contact sports, swimming and working outdoors. The procedure also provides functional vision without glasses or contacts so that simple tasks such as reading an alarm clock or clearly seeing street signs are not difficult any more.

### PATIENT COMMENTS

*"I shifted from soft contact lenses to PCM, and I can see 20/20 when I take them off!"* - T.K.

*"I have been through the program and I am very happy with it, and I am bringing my daughter in to do it."* - A.S.

*"I never realized how precious the gift of sight was until I went through the procedure."* - A.S.

*"I am very happy with the program and I would recommend PCM with no reservations."* - D.M.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1.a. Respondent Mid-South PCM Group, P.C. ("Mid South"), is a Tennessee corporation, with its principal office or place of business at 2865 Summer Oaks Drive, Bartlett, TN.

1.b. Respondent Eye and Vision Clinic, P.C. ("Vision Clinic"), is a Tennessee corporation, with its principal office or place of business at 2865 Summer Oaks Drive, Bartlett, TN.

1.c. Respondent International Computerized Orthokeratology Society, Inc. ("ICOKS"), is a Tennessee corporation, with its principal office or place of business located at 2865 Summer Oaks Drive, Bartlett, TN.

1.d. Respondent J. Mason Hurt, O.D., is the sole owner and President of the corporate respondents. He formulates, directs, and controls the policies, acts or practices of the corporate respondents.

His principal office or place of business is the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For the purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. *"Clearly and prominently"* shall mean:

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print advertisement, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

D. In an advertisement on any electronic media received by consumers via computer, such as the Internet's World Wide Web or commercial on-line computer services, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multi-screen documents, the

disclosure shall appear on the first screen and on any screen containing ordering information.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

3. *"Refractive vision deficiency"* shall mean any vision deficiency treatable by corrective lenses, including but not limited to nearsightedness (myopia), farsightedness (hyperopia), astigmatism (distorted vision), and presbyopia (aging eyes).

4. *"Substantially similar service"* shall mean any ophthalmic service or procedure using contact lenses or similar devices to modify the shape of the cornea and reduce or eliminate refractive vision deficiencies.

5. Unless otherwise specified, *"respondents"* shall mean Mid-South PCM Group, P.C., Eye and Vision Clinic, P.C., and International Computerized Orthokeratology Society, corporations, their successors and assigns and their officers; J. Mason Hurt, O.D., individually and as an officer of the corporations; and each of the above's agents, representatives and employees.

6. *"Commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

*It is ordered*, That respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of Precise Corneal Molding ("PCM") services or any substantially similar service, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

A. Such service provides a cure for any refractive vision deficiency thereby permanently eliminating the need for all corrective eyewear, including eyeglasses and contact lenses;

B. All people can achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear devices used with such service occasionally or at night;

C. Such service has been approved by the Federal Aviation Administration and all branches of the United States military for use in correcting refractive vision deficiencies; or

D. Studies at the University of Houston College of Optometry (1976-77), University of California at San Diego Medical School (1980), University of California at Berkeley College of Optometry (1982-83), and Pacific University College of Optometry (1984), prove that such service is safe and effective in correcting nearsightedness, farsightedness, and astigmatism.

II.

*It is further ordered*, That respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of PCM services or any substantially similar service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

A. The number of people who can achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear devices used with such service occasionally or at night;

B. The number of people who will experience stabilized vision after only a few weeks or months of treatments under such service;

C. The ability of such service to prevent or reverse deteriorating nearsightedness in children;

D. The comparative safety of such service and contact lenswear;

E. The comparative effectiveness of such service and refractive surgical methods in eliminating nearsightedness, farsightedness, or any form of astigmatism; or

F. The number of people whom such service has helped achieve normal vision;

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

*It is further ordered*, That respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of any service, procedure, or product in or affecting commerce, shall not

misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

IV.

*It is further ordered*, That respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of any service, procedure, or product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such service, procedure, or product is endorsed or approved by any governmental or professional organization or association, or complies with or meets standards or guidelines for such services, procedures, or products established by any such organization or association, unless such is the case.

V.

*It is further ordered*, That respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of any service, procedure, or product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the service, procedure, or product represents the typical or ordinary experience of members of the public who use the service, procedure, or product, unless:

A. The representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the service, procedure, or product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

VI.

*It is further ordered*, That respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of ophthalmic services, procedures, or products, purporting to treat, mitigate, or cure any refractive vision deficiency, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the relative or absolute efficacy, performance, benefits, safety, or success of any such service, procedure, or product, unless the representation is true and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

VII.

*It is further ordered*, That respondents shall:

A. Not disseminate to any optometrist or eye care provider any material containing any representations prohibited by this order;

B. Send by certified mail, return receipt requested, an exact copy of the notice attached hereto as Attachment A to each optometrist or eye care provider with whom respondents have done business since January 1, 1994, within thirty (30) days of the date this order becomes final, to the extent that such persons are known to respondents through a diligent search of their records, including but not limited to computer files, sales records, and inventory lists. The mailing shall not include any other documents; and,

1. In the event that respondents receive any information that subsequent to receipt of Attachment A any optometrist or eye care provider mentioned in subpart B of this part is using or disseminating any advertisement or promotional material that contains any representation prohibited by this order, respondents shall immediately notify the optometrist or eye care provider that respondents will terminate said optometrist or eye care provider's right to market and/or perform PCM ortho-k if he or she continues to use such advertisements or promotional materials; and,

2. Terminate any optometrist or eye care provider mentioned in subpart B of this part about whom respondents receive any information that such person has continued to use advertisements or promotional materials that contain any representation prohibited by this order after receipt of the notice required by subpart B of this part;

C. For a period of three (3) years following service of this order, send by certified mail, return receipt requested, an exact copy of the notice attached hereto as Attachment A to each optometrist or eye care provider with whom respondents do business after the date of service of this order who has not previously received the notice. Such notices shall be sent no later than the earliest of: (1) the execution of a sales or training agreement or contract between respondents and the prospective optometrist or eye care provider; or (2) the receipt and deposit of payment from a prospective optometrist or eye care provider of any consideration in connection with the sale of any service or rights associated with PCM ortho-k. The mailing shall not include any other documents.

VIII.

*It is further ordered*, That respondents Mid-South, Vision Clinic, and ICOKS, and their successors and assigns, and respondent J. Mason Hurt, O.D., shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for such representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IX.

*It is further ordered*, That respondents Mid-South, Vision Clinic, and ICOKS, and their successors and assigns, and respondent J. Mason Hurt, O.D., shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, independent contractors and representatives having responsibilities with respect to the subject matter of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

*It is further ordered*, That respondents Mid-South, Vision Clinic, and ICOKS, and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in their legal form of organization, including but not limited to dissolution, assignment, sale or other change that would result in the emergence of a successor partnership(s) or corporation(s), the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in respondents' name or address. Provided, however, that, with respect to any proposed change in respondents' legal form about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

*It is further ordered*, That respondent J. Mason Hurt, O.D., for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current businesses or employment, or of his affiliation with Mid-South, Vision Clinic, or ICOKS, or of his affiliation with any new business or employment. The notice shall include the respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required

by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XII.

*It is further ordered*, That respondents Mid-South, Vision Clinic, and ICOKS, and their successors and assigns, and respondent J. Mason Hurt, O.D., shall, within sixty (60) days after the date of service of this order, and one year thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIII.

This order will terminate on November 5, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

ATTACHMENT A

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED
[To Be Printed on International Computerized Orthokeratology Society, Inc. letterhead]

[date]

Dear [optometrist or eye care provider]:

Mid-South PCM Group, P.C., International Computerized Orthokeratology Society, Inc., Eye and Vision Clinic, P.C., and J. Mason Hurt, O.D., recently settled a civil dispute with the Federal Trade Commission (FTC) and the States of Arizona, Illinois, Missouri, Tennessee, and Texas (the States) involving advertising claims for our Precise Corneal Molding (PCM ortho-k) service. As a part of the settlement, we must make sure that you stop using or distributing advertisements or promotional materials that you may have previously received that include these claims.

Our settlements with the FTC and the States prohibit us from making false or unsubstantiated claims for PCM ortho-k or any "substantially similar service," defined as "any ophthalmic service or procedure using contact lenses or similar devices to modify the shape of the cornea and reduce or eliminate refractive vision deficiencies." Please see the attached FTC Complaint and Agreement Containing Consent Order for detailed information. Although we do not admit that the FTC's allegations are true, we have agreed to send this letter as a part of our settlement with the FTC.

Sincerely yours,

J. Mason Hurt, O.D.
President
International Computerized Orthokeratology Society, Inc.

IN THE MATTER OF

# BLUE CORAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9280. Complaint, July 12, 1996--Decision, Dec. 9, 1997*

This consent order prohibits Blue Coral, Inc., Blue Coral - Slick 50, Inc., and Blue Coral - Slick 50, Ltd., successors-in-interest to Quaker State - Slick 50, Inc., Slick 50 Management, Inc., Slick 50 Products Corp. and Slick 50 Corp., among other things, from making any claims about the performance, benefits, efficacy, attributes or use of any engine treatment, oil additive, or Slick 50 engine lubricant, unless the companies possess and rely on competent and reliable evidence to substantiate the claims. In addition, it prohibits the companies from claiming that any other Slick 50 motor vehicle lubricant reduces wear on a part, extends the part's life, lowers engine temperature, reduces toxic emissions, increases gas mileage or increases horsepower, unless they can substantiate the claim. The respondents also will be required to notify resellers of the product about the settlement with the Commission and the restrictions on advertising claims. Finally, the consent order holds open the option that the Commission may seek consumer redress.

## *Appearances*

For the Commission: *Lawrence Hodapp, Robert Frisby, Jonathan Cowen* and *Laura DeMartino*.

For the respondents: *William MacLeod, Collier, Shannon, Rill & Scott*, Washington, D.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Quaker State - Slick 50, Inc., a corporation; Slick 50 Management, Inc., a corporation; Slick 50 Products Corp., a corporation; and Slick 50 Corp., a corporation, or their predecessors-in-interest ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Quaker State - Slick 50, Inc. ("Quaker State - Slick 50"), is a Delaware corporation, with its office and principal place of business located at 1187 Brittmoore Road, Houston, Texas 77043. Quaker State - Slick 50 is a holding company for Slick 50 Management, Inc., and is the successor-in-interest to

Slick 50, Inc., which was merged with and into Quaker State - Slick 50 on July 11, 1995.

Respondent Slick 50 Management, Inc. ("Slick 50 Management"), is a Delaware corporation, with its office and principal place of business located at 1187 Brittmoore Road, Houston, Texas. Slick 50 Management is a wholly-owned subsidiary of Quaker State - Slick 50, and is a holding company for Slick 50 Products Corp., Slick 50 Corp., and the "Slick 50" trademark.

Respondent Slick 50 Products Corp. ("Slick 50 Products") is a Delaware corporation, with its office and principal place of business located at 1187 Brittmoore Road, Houston, Texas Slick 50 Products is a wholly-owned second-tier subsidiary of Quaker State - Slick 50.

Respondent Slick 50 Corp. is a Delaware corporation, with its office and principal place of business located at 1187 Brittmoore Road, Houston, Texas Slick 50 Corp. is a wholly-owned second-tier subsidiary of Quaker State - Slick 50.

PAR. 2. Respondents have manufactured, advertised, promoted, offered for sale, sold and distributed various aftermarket motor oil additives (sometimes referred to as engine treatments) known by the product name Slick 50 to consumers. These products consist primarily of particles of the polymer polytetrafluoroethylene ("PTFE") suspended in a fully formulated motor oil.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for Slick 50, including, but not necessarily limited to, the attached Exhibits A-I. These advertisements contain the following statements and visual depictions:

A. A television advertisement for Slick 50:

Video: Key starting the ignition followed by metal file and metal rope grinding together.

Announcer: Every time you cold start your car without Slick 50 protection, metal grinds against metal in your engine.

Video: A key turning the ignition accompanied by sound of metal grinding.

Announcer: With each turn of the ignition you do unseen damage, because at cold start-up most of the oil is down in the pan.

Video: Shows a box of Slick 50, and then shows a bottle of Slick 50 being poured into a funnel.

Announcer: But Slick 50's unique chemistry bonds to engine parts. It reduces wear up to 50% for 50,000 miles.

[Super: Proven by Independent Lab Tests.]
Video: A large heavy ball is dropped down onto the car and demolishes it.
Announcer: So get Slick 50, while there's still time.
Video: Shows three different boxes of Slick 50 and then shows the demolished car.
Announcer: Slick 50's engine formula, the world's number one selling engine treatment.
[Super: Advanced Technology/Street Smart Science.] (Exhibit A)

B. A television advertisement for Slick 50:

Video: Family is in a cemetery watching a car fall into a grave.
Announcer: There is nothing quite so tragic as an untimely loss.
Video: A bottle of Slick 50 is poured into a funnel.
Announcer: So protect the life of your car's engine with Slick 50.
[Super: Advanced Technology/Street Smart Science.]
The world's number one selling engine treatment. (Exhibit B)

C. A radio advertisement for Slick 50:

Experts say up to 80% of engine wear takes place at start-up. They explain it this way... when you first start your car, the oil is down in the oil pan. It's a good ten seconds before it starts working again. Ten seconds of harsh, metal-to-metal wear. Slick 50 Engine Formula protects against that wear... by bonding the slipperiest stuff ever invented directly to those wear points. A special chemical package makes it happen... and nobody else has it.
So when you start your engine, Slick 50 is on the job even when your oil isn't. If you're serious about fighting wear, give your engine what it takes. Slick 50 Engine Formula. (Exhibit C)

D. A promotional brochure for Slick 50:

LUBRICATION AND TODAY'S ENGINES

Today's engines are marvels of modern engineering...But there's a downside to this new technology. As operating conditions become more extreme, your motor oil can lose its ability to effectively lubricate the engine...it becomes obvious that under many conditions, even modern motor oil formulations may not provide the anti-wear protection you need.

. . .

WHAT IT TAKES IS SLICK 50 AUTOMOTIVE ENGINE FORMULA

Slick 50 Automotive Engine Formula is a technologically advanced automotive engine treatment that protects critical engine parts against wear...at start-up and through thousands of miles of punishing stop-and-go driving. Its unique and effective protection lasts through dozens of oil changes, for 50,000 miles. That's what it takes...and here's what it does.

* Reduces engine wear up to 50%
* Provides protection during crucial start-up period
* Protects during high-temperature, high-stress conditions
* Protection lasts for 50,000 miles

. . .

If you have Slick 50, what you have is a protective coating of PTFE bonded on there. (Expert endorser)

What makes Slick 50 Automotive Engine Formula different is an advanced chemical support package designed to bond a specially activated PTFE to the metal in your engine. (Exhibit D)

E. Slick 50 product packaging:

PROVEN PROTECTION

At Start-Up: Slick 50 Automotive Engine Formula is best known for providing wear protection at start-up. In one tightly controlled sequence of start-stop tests conducted by a renowned independent testing laboratory, engines treated with Slick 50 showed a full 42 percent less wear on the piston rings than identical untreated engines. (See Chart 1)

. . .

Claims for Slick 50 Automotive Engine Formula are verified through these and other independent laboratory tests conducted at nationally recognized facilities monitored by the American Society for Testing and Materials (ASTM).

. . .

BENEFITS SHOWN IN INDEPENDENT TEST PROGRAMS
Reduces engine wear up to 50%
Provides protection at start-up
Protects in high temperature, high-stress conditions
Protects for 50,000 miles. (Exhibit E)

F. Slick 50 product packaging:

SLICK 50[.] THE ENGINE LIFE EXTENDER
SLICK 50 ADVANCED FORMULA ENGINE TREATMENT[.] Extends Engine Life . . .
Reduces friction, heat & wear

. . .

Since Slick 50 was first developed more than 15 years ago, it has been tested more than any other engine treatment. It's been proven to work.

. . .

WHY SLICK 50 IS BETTER PROTECTS BETTER THAN ORDINARY MOTOR OIL START UP PROTECTION

When you turn off your engine, virtually all your motor oil drains down into the pan, leaving critical parts unprotected. After a few hours, when you turn the key and drive, metal grinds against metal. This is when up to 80 percent of all engine wear occurs. THERE'S ONE SOLUTION. Slick 50's unique formula . . . is proven to bond to vital engine parts, protecting them better than ordinary motor oil.

. . .

MAKES ENGINES LAST LONGER

Less heat and wear on critical parts means better long term performance and cooler running. This lowers your risk of costly engine repairs, rebuilds, and expensive breakdowns.

PROVEN THE BEST
50,000 MILE ENGINE WEAR TEST. . .
41% LESS WEAR ON TOP ROD BEARINGS

Industry recognized lab tests in real engines, under real operating conditions, prove Slick 50 significantly reduces wear for 50,000 miles. Slick 50 is the only engine treatment to have tested, passed and published the results of these stringent tests. (Exhibit F)

G. Slick 50 promotional brochure:

Count on Slick 50 to:
* Reduce engine wear at start-up.
* Lower engine temperature by reducing friction.
* Improve horsepower.
* Increase gas mileage.
* Reduce toxic emissions.

Military specifications are MIL-L-2104-C MIL-L-46152-A.

. . .

TEST RESULTS CONFIRM MORE THAN 50% WEAR REDUCTION

. . .

It's performed in U.S. Government vehicles.
(Exhibit G) (English language) and (Exhibit H) (Spanish language)

H. Slick 50 Home Page on Internet
("http://www.slick50.com"):
Slick 50 Automotive Engine Formula significantly reduces wear on critical engine parts:
* Protects the engine at start-up, when substantial engine wear occurs.
* Reduces wear on engine parts operating under conditions of boundary lubrication (that is, making metal-to-metal contact), including the first and second piston rings.
* Reduces engine wear by up to 50 percent for 50,000 miles.
* Long term, by reducing engine wear, Slick 50 Automotive Engine Formula can contribute to lower maintenance and repair costs and to extended engine life. By reducing ring wear, it also has the potential to reduce automotive emissions.
(Exhibit I)

PAR. 5. Through the use of the statements and visual depictions contained in the advertisements and promotional materials referred to in paragraph four, including, but not necessarily limited to, the advertisements and promotional materials attached as Exhibits A-I, respondents have represented, directly or by implication, that:

A. Automobile engines generally have little or no protection from wear at or just after start-up unless they have been treated with Slick 50.

B. Automobile engines commonly experience premature failure caused by wear unless they are treated with Slick 50.

C. Slick 50 coats engine parts with a layer of PTFE.

D. Slick 50 meets military specifications for aftermarket motor oil additives.

PAR. 6. In truth and in fact:

A. Automobile engines generally do not have little or no protection from wear at or just after start-up, regardless of whether they have been treated with Slick 50. Most automobile engines achieve adequate oil flow soon after start-up. Even prior to full oil flow, most automobile engines using the grade and weight of motor oil recommended in the owner's manual and changed at the recommended intervals are adequately protected against wear.

B. It is uncommon for automobile engines to experience premature failure caused by wear regardless of whether they are treated with Slick 50. Engine wear, including wear at or just after

start-up, is insufficient to cause engine failure within the life of most automobiles, when owners use the grade and weight of motor oil recommended in their owner's manual and change the oil at recommended intervals.

C. Slick 50 does not coat engine parts with a layer of PTFE.

D. Slick 50 does not meet military specifications for aftermarket motor oil additives.

Therefore the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements and visual depictions contained in the advertisements and promotional materials referred to in paragraph four, including, but not necessarily limited to, the advertisements and promotional materials attached as Exhibits A-I, respondents have represented, directly or by implication, that:

A. Compared to motor oil alone, Slick 50:

1. Reduces engine wear.
2. Reduces engine wear by more than 50%.
3. Reduces engine wear by up to 50%.
4. Reduces engine wear at start-up.
5. Extends the duration of engine life.
6. Lowers engine temperatures.
7. Reduces toxic emissions.
8. Increases gas mileage.
9. Increases horsepower.

B. One treatment of Slick 50 continues to reduce engine wear for 50,000 miles.

C. Slick 50 has been used in a significant number of U.S. Government vehicles.

PAR. 8. Through the use of the statements and visual depictions contained in the advertisements and promotional materials referred to in paragraph four, including, but not necessarily limited to, the advertisements and promotional materials attached as Exhibits A-I, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five and seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time they made the representations set forth in paragraphs five and seven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements and visual depictions contained in the advertisements and promotional materials referred to in paragraph four, including, but not necessarily limited to, the advertisements and promotional materials attached as Exhibits A-I, respondents have represented, directly or by implication, that:

A. Tests prove that, compared to motor oil alone, Slick 50:

1. Reduces engine wear by more than 50%.
2. Reduces engine wear by up to 50%.
3. Reduces engine wear at start-up.

B. Tests prove that one treatment of Slick 50 continues to reduce engine wear for 50,000 miles.

PAR. 11. In truth and in fact:

A. Tests do not prove that, compared to motor oil alone, Slick 50:

1. Reduces engine wear by more than 50%.
2. Reduces engine wear by up to 50%.
3. Reduces engine wear at start-up.

B. Tests do not prove that one treatment of Slick 50 continues to reduce engine wear for 50,000 miles.

Therefore the representations set forth in paragraph ten were, and are, false and misleading.

PAR. 12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

| | |
|---|---|
| **Video:** | Key starting the ignition followed by metal rod and metal rope grinding together. |
| **Announcer:** | Every time you cold start your car without Slick 50 protection, metal grinds against metal in your engine. |
| **Video:** | A key turning the ignition accompanied by sound of metal grinding. |
| **Announcer:** | With each turn of the ignition you do unseen damage, because at cold start-up most of the oil is down in the pan. |
| **Video:** | Shows a box of Slick 50, and then shows a bottle of Slick 50 being poured into a funnel. |
| **Announcer:** | But Slick 50's unique chemistry bonds to engine parts. It reduces wear up to 50% for 50,000 miles. [**Super:** Proven by Independent Lab Tests.] |
| **Video:** | A large heavy ball is dropped down onto the car and demolishes it. |
| **Announcer:** | So get Slick 50, while there's still time. |
| **Video:** | Shows three different boxes of Slick 50 and then shows the demolished car. |
| **Announcer:** | Slick 50's engine formula, the world's number one selling engine treatment. [**Super:** Advanced Technology/Street Smart Science.] |

EXHIBIT B

| | |
|---|---|
| **Video:** | Family is in a cemetery watching a car fall into a grave. |
| **Announcer:** | There is nothing quite so tragic as an untimely loss. |
| **Video:** | A bottle of Slick 50 is poured into a funnel. |
| **Announcer:** | So protect the life of your car's engine with Slick 50. [**Super:** Advanced Technology/Street Smart Science.™] The world's number one selling engine treatment. |

EXHIBIT C

Paul Harvey #2
:60 Radio
Approved, BM 3/17/93

PAUL HARVEY:

If you're one of the millions of Americans who believe in taking good care of your car, chances are you've heard about a product called Slick 50 Engine Formula. Slick 50 was developed to help reduce wear in automobile engines. Over the past few years, it's become something of a phenomenon.

Why? Because it works. It does just what it says it does. It reduces engine wear, especially during start-up. Experts say up to 80% of engine wear takes place at start-up. They explain it this way... when you first start your car, the oil is down in the oil pan. It's a good ten seconds before it starts working again. Ten seconds of harsh, metal-to-metal wear.

EXHIBIT C

11 24 92 11:05 PETROLON TECHNOLOGIES - 102 228 1371 NO.876 908

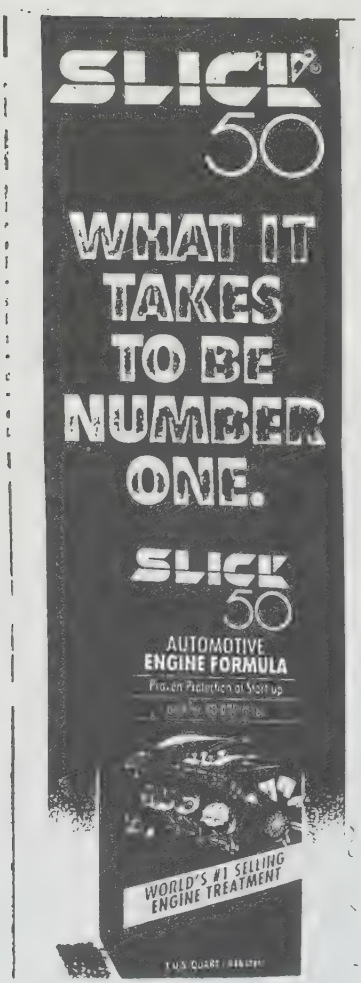
Paul Harvey #2 - page 2

Slick 50 Engine Formula protects against that wear... by bonding the slipperiest stuff ever invented directly to those wear points. A special chemical package makes it happen... and nobody else has it.

So when you start your engine, Slick 50 is on the job even when your oil isn't. If you're serious about fighting wear, give your engine what it takes. Slick 50 Engine Formula.

#####

EXHIBIT D


SLICK 50
WHAT IT TAKES TO BE NUMBER ONE.
SLICK 50
AUTOMOTIVE ENGINE FORMULA
WORLD'S #1 SELLING ENGINE TREATMENT

## LUBRICATION AND TODAY'S ENGINES

Today's engines are marvels of modern engineering: they operate under tolerances, temperatures, pressures and conditions that yesterday's engines simply were not designed for. But there's a down side to this new technology. As operating conditions become more extreme, your motor oil can lose its ability to effectively lubricate the engine.

Add to this the problem of dirt, varnish and combustion by-products that build up on critical engine parts, and it becomes obvious that under many conditions, even modern motor oil formulations may not provide the anti-wear protection you need. Simply combining motor oil with a lubrication agent such as PTFE or potentially hazardous heavy metals is not the answer, either.

## WHAT IT TAKES IS SLICK 50® AUTOMOTIVE ENGINE FORMULA

Slick 50 Automotive Engine Formula is a technologically advanced automotive engine treatment that protects critical engine parts against wear... at start-up and through thousands of miles of punishing stop-and-go driving. Its unique and effective protection lasts through dozens of oil changes, for 50,000 miles. That's what it takes... and here's what it does.

- Reduces engine wear up to 50%
- Provides protection during crucial start-up period
- Protects during high-temperature, high-stress conditions
- Protection lasts for 50,000 miles
- Treats critical engine parts *(Not an oil or an oil additive)*
- Will not clog oil filters

*"Starting your engine is a terrible thing to do...When your engine is started cold, you have very little oil circulating and little or no oil on the metal parts of your engine. If you have Slick 50®, what you have is a protective coating of PTFE bonded on there. So when you start your car cold, you don't get the wear that you normally would."*

*Bob Sikorsky*
*Automotive Engineer, Author*
*& Syndicated Columnist for the*
*New York Times*

It's easy to be number one when you're the only product in your category. But when you've got a market full of competitors, you earn your position every day. Fifteen years ago Slick 50 created the engine treatment category. Since then, store shelv have filled up with look-alikes and imitations. But none has yet been able to reproduce our unique chemistry – or the unique way it protects internal combustion engines. That's why Slick 50 Automo Engine Formula is the standard against which all t others are measured, and why, after fifteen years, i still the hottest-selling engine treatment in the wor More than 20 million cars in 67 countries are ridin on the benefits of Slick 50.

## UNIQUE SLICK 50 CHEMISTRY™ IS THE KEY

**PTFE is the slipperiest** solid substance ever invented. Lubrication engineers tell us that only wet ice sliding on wet ice has a lower coefficient

A.

*Fig. 1*
*Ordinary Engine Treatments*

*PTFE*

EXHIBIT D

of friction. So why doesn't every engine treatment with PTFE work like Slick 50 Automotive Engine Formula?

**The answer is simple** when you know the facts. Most other products are little more than PTFE and motor oil (Fig.1). What makes Slick 50 Automotive Engine Formula different is an advanced chemical support package designed to bond a specially activated PTFE to the metal in your engine (Fig.2). Because if the PTFE doesn't bond properly, it will drain back into the oil pan every time you turn off your engine.

**No other product has Slick 50 chemistry,** and that's why no other product can provide Slick 50 Automotive Engine Formula's unique, full-time, long lasting protection.

## UNIQUE SLICK 50 CHEMISTRY™

| FEATURES | BENEFITS |
|---|---|
| A: Premium multi-viscosity carrier oil | Supports a wide variety of motor oils, temperatures and driving conditions. |
| B: Specially sized, electron beam activated PTFE particles | Maximizes bonding with the metal. Ensures that the PTFE goes where it's supposed to and stays there. |
| C: Colloidal suspension chemistry | Ensures that the PTFE will not settle out in the oil pan, and prevents clumping. No shaking necessary. Just pour it in and you're ready to go. |
| D: Surface preparation chemistry | Maximizes the efficiency of the bonding process. |
| E: Process support chemistry | Promotes and facilitates interaction between PTFE and metal. Ensures that protection will last for 50,000 miles. |




*Fig. 2*
*Unique Slick 50 Chemistry*

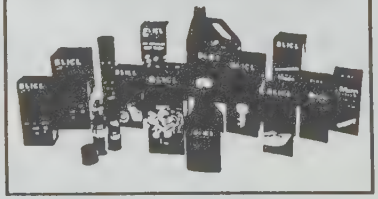
EXHIBIT D

## PROTECTION FOR 50,000 MILES

Slick 50 is proud to be the leader in the engine treatment category and with that leadership comes a responsibility that we take very seriously—to maintain the highest level of quality and performance in our products, and to stand behind those products with integrity. To you, we offer our guarantee that our products will work as advertised.

**Slick 50 Automotive Engine Formula will not void engine manufacturers' warranties.**

### THE SLICK 50 FAMILY OF PRODUCTS



Automotive Engine Formula
High Performance Engine Formula
RV Engine Formula
Big Rig Formula
4 Cycle Marine Engine Formula
2 Cycle Marine Engine Formula
4 Cycle Motorcycle Formula
4 Cycle Small Engine Formula
2 Cycle Small Engine Formula
Man Trans®
Auto Trans®
One Lube®
One Grease®

SLICK® 50

## PROVING AND IMPROVING THROUGH TESTING AND RESEARCH

**SLICK 50 ENGINE TREATMENTS** aren't what they were 15 years ago. They're better. Since they were first developed, an ongoing program of testing and research has focused exclusively on two goals; to prove what Slick 50 products do and find ways to make them better.

**SLICK 50 PRODUCTS CORPORATION** has committed millions of dollars to a testing program that's far more extensive than it *has* to be. To prove that our claims are reliable, the company employs independent testing laboratories as well as our own advanced automotive laboratory, plus top-rated, technology-oriented racing teams. Comprehensive road tests are also conducted in the harshest of real-world conditions, using taxi cab fleets and big rig heavy haulers around the world.

*A Laser Particle Size Analyser, part of the advanced equipment at Slick 50's modern laboratory, uses laser diffraction to measure particles in the sub micron range.*

**INDEPENDENT LABORATORY TESTS PROVE** that Slick 50 Automotive Engine Formula actually reduces wear at start-up and during 50,000 miles of operation. The laboratories are nationally recognized facilities monitored by the American Society for Testing and Materials (ASTM).

**MATERIALS TESTING** is devoted to producing new and better products. Slick 50's brand new, well-equipped laboratory in Houston, Texas, is dedicated to the purpose of creating, developing and testing the next generation of Slick 50 products. The company is determined that each new product will earn the number one place in its own category.

*Slick 50's brand new, well equipped laboratory in Houston, Texas.*

*Slick 50 products undergo a stringent program of laboratory and field testing.*

*Motor sports play a big part in research and testing at Slick 50 Product. NASCAR (Winston Cup®, Busch Grand National® and ARCA events) to racing teams and their engine specialists, we conduct stringent tests to dynamometer test stands.*

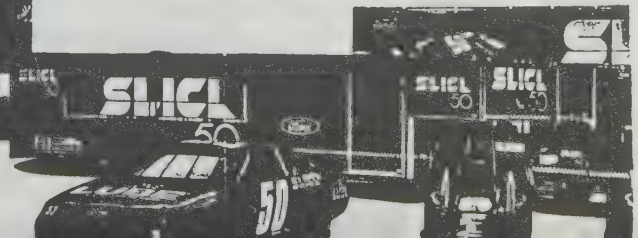


EXHIBIT D

## THE 50,000 MILE MARATHON

While some other products *claim* to protect for 50,000 miles, Slick 50 Automotive Engine Formula is the only product we know of that has actually been tested for 50,000 miles. Identical engines were used – half treated with Slick 50 Automotive Engine Formula and half lubricated only with a premium grade, multi-viscosity motor oil as recommended by the engine manufacturer.

The oil was changed every 3,000 miles in all engines; no additional engine treatment was added. After 50,000 miles, tests confirmed that Slick 50 protection stayed on the job through more than fifteen oil changes, long after the original treatment.

Both the treated and untreated engines were also tested for wear on the rod end bearings. On the engines treated with Slick 50 Automotive Engine Formula, the top half of the bearings – which takes most of the wear-inducing load – showed 41 percent less wear than bearings from the untreated engines! 41 percent less wear is an impressive figure by any standards – even our own.

*Chart 1*

41% LESS WEAR
ON ROD BEARINGS
METAL LOSS 6090 GRAMS
METAL LOSS 3613 GRAMS
AVERAGE METAL LOSS ON ROD BEARINGS AFTER 50,000 MILES

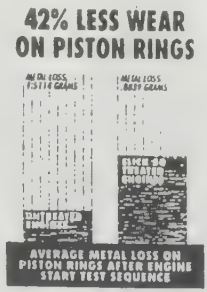
## START-UP TESTING: DON'T TRY THIS AT HOME

Slick 50 Automotive Engine Formula is best known for providing wear protection at start-up, and no claim has been tested more thoroughly or rigorously. As in other tests, identical V-6 engines were used – half treated with Slick 50 Automotive Engine Formula and half not. All engines were started, idled and then run for ten minutes at the equivalent of 50 mph. This was repeated 330 times. Then the oil and oil filter were changed and the engines were run another four hours at 70 mph to flush them out.

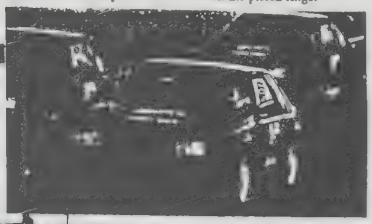
The oil was then drained from all engines and the oil filters removed. The engines were then started 500 times – with no oil in them at all! Remember, like the untreated engines, those treated with Slick 50 Automotive Engine Formula had been flushed out with motor oil before the dry-start tests were run.

After the engines had been dry started 500 times, the engines treated with Slick 50 Automotive Engine Formula showed a full 42 percent less wear on the piston rings!

*Chart 2*


42% LESS WEAR
ON PISTON RINGS
METAL LOSS 13.114 GRAMS
METAL LOSS .8839 GRAMS
AVERAGE METAL LOSS ON PISTON RINGS AFTER ENGINE START TEST SEQUENCE

*ts Corporation. The company's involvement in racing ranges from NHRA, motorcycles and offshore powerboats. Aided by our own th on the track and in the shop, where engines are tested on*



*The ongoing Slick 50 Produ ts Testin Program includes long distance drivi under rigorous operating conditions*

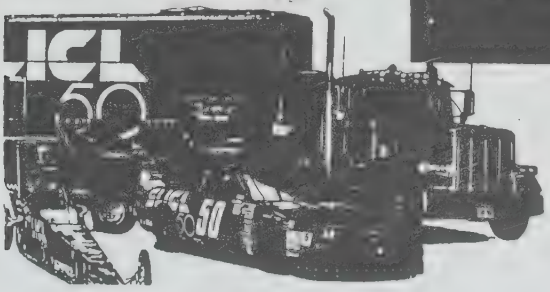
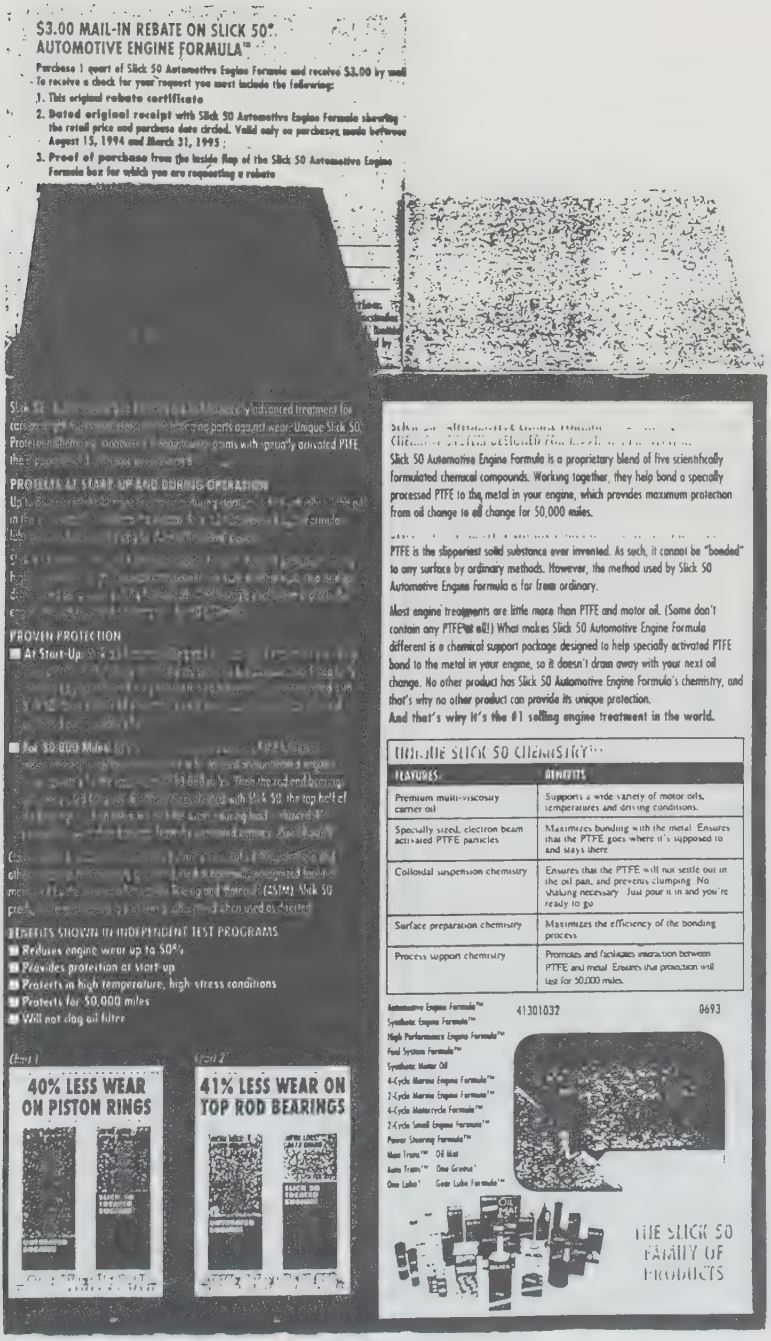


EXHIBIT E

$3.00
REBATE
$3.00 off the purchase price of Slick 50® Automotive Engine Formula™
See inside for details. Offer expires March 31, 1995
SLICK 50
ITEM
41301032
PROOF OF PURCHASE
DIRECTIONS
SLICK 50
AUTOMOTIVE ENGINE FORMULA
Proven Protection at Start-up and for 50,000 Miles
ACEITE PORTADOR: SAE 10W-30
CLASIFICACION DE SERVICIO API: SH/CD
PROTECT YOUR ENVIRONMENT
SLICK 50 PRODUCTS CORPORATION
$3.00 REBATE
$3.00 OFF THE PRICE OF THE WORLD'S #1 SELLING ENGINE TREATMENT
1 U.S. QUART (.946 liter)

# EXHIBIT E


$3.00 MAIL-IN REBATE ON SLICK 50®
AUTOMOTIVE ENGINE FORMULA™
Purchase 1 quart of Slick 50 Automotive Engine Formula and receive $3.00 by mail
To receive a check for your request you must include the following:
1. This original rebate certificate
2. Dated original receipt with Slick 50 Automotive Engine Formula showing the retail price and purchase date circled. Valid only on purchases made between August 15, 1994 and March 31, 1995
3. Proof of purchase from the inside flap of the Slick 50 Automotive Engine Formula box for which you are requesting a rebate
PROTECTS AT START-UP AND DURING OPERATION
PROVEN PROTECTION
At Start-Up
BENEFITS SHOWN IN INDEPENDENT TEST PROGRAMS
Reduces engine wear up to 50%
Provides protection at start-up
Protects in high temperature, high-stress conditions
Protects for 50,000 miles
Will not clog oil filters
(Test 1)
40% LESS WEAR ON PISTON RINGS
(Test 2)
41% LESS WEAR ON TOP ROD BEARINGS
Slick 50 Automotive Engine Formula is a proprietary blend of five scientifically formulated chemical compounds. Working together, they help bond a specially processed PTFE to the metal in your engine, which provides maximum protection from oil change to oil change for 50,000 miles.
PTFE is the slipperiest solid substance ever invented. As such, it cannot be "bonded" to any surface by ordinary methods. However, the method used by Slick 50 Automotive Engine Formula is far from ordinary.
Most engine treatments are little more than PTFE and motor oil. (Some don't contain any PTFE at all!) What makes Slick 50 Automotive Engine Formula different is a chemical support package designed to help specially activated PTFE bond to the metal in your engine, so it doesn't drain away with your next oil change. No other product has Slick 50 Automotive Engine Formula's chemistry, and that's why no other product can provide its unique protection.
And that's why it's the #1 selling engine treatment in the world.
THE SLICK 50 CHEMISTRY™
FEATURES
BENEFITS
Premium multi-viscosity carrier oil
Supports a wide variety of motor oils, temperatures and driving conditions.
Specially sized, electron beam activated PTFE particles
Maximizes bonding with the metal. Ensures that the PTFE goes where it's supposed to and stays there
Colloidal suspension chemistry
Ensures that the PTFE will not settle out in the oil pan, and prevents clumping. No shaking necessary. Just pour it in and you're ready to go
Surface preparation chemistry
Maximizes the efficiency of the bonding process
Process support chemistry
Promotes and facilitates interaction between PTFE and metal. Ensures that protection will last for 50,000 miles.
Automotive Engine Formula™
Synthetic Engine Formula™
High Performance Engine Formula™
Fuel System Formula™
Synthetic Motor Oil
4-Cycle Marine Engine Formula™
2-Cycle Marine Engine Formula™
4-Cycle Motorcycle Formula™
2-Cycle Small Engine Formula™
Power Steering Formula™
Moto Foam™ Oil Mist
Auto Foam™ One Ounce
One Lube™ Gear Lube Formula™
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THE SLICK 50 FAMILY OF PRODUCTS

EXHIBIT F

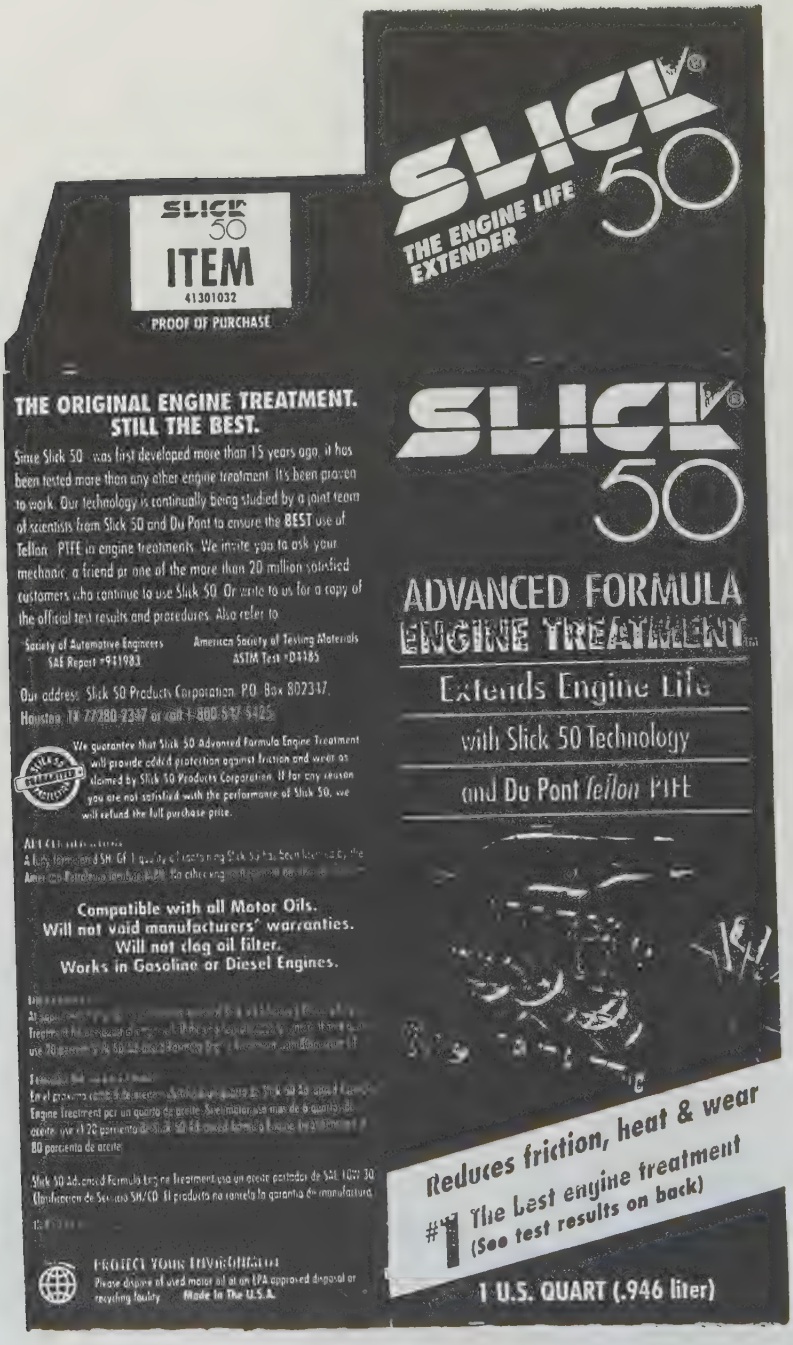
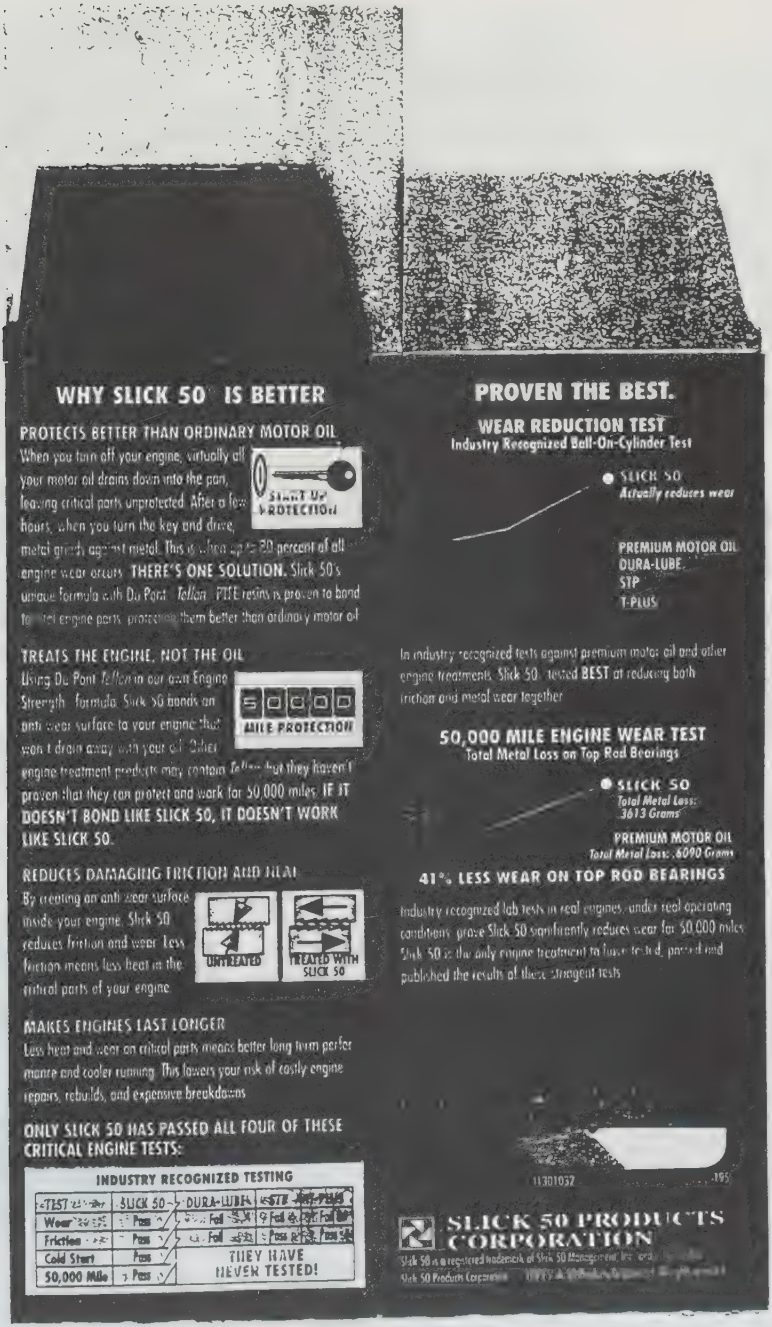
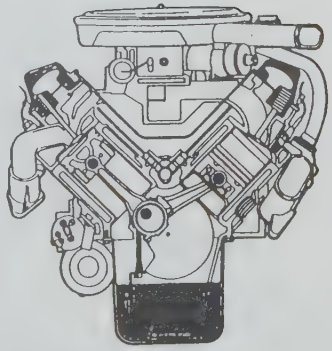

SLICK 50
ITEM
41301032
PROOF OF PURCHASE
THE ORIGINAL ENGINE TREATMENT.
STILL THE BEST.
Since Slick 50 was first developed more than 15 years ago, it has been tested more than any other engine treatment. It's been proven to work. Our technology is continually being studied by a joint team of scientists from Slick 50 and Du Pont to ensure the BEST use of Teflon PTFE in engine treatments. We invite you to ask your mechanic, a friend or one of the more than 20 million satisfied customers who continue to use Slick 50. Or write to us for a copy of the official test results and procedures. Also refer to
Society of Automotive Engineers
SAE Report #911983
American Society of Testing Materials
ASTM Test #D3385
Our address: Slick 50 Products Corporation P.O. Box 802347
Houston, TX 77280-2347 or call 1-800-537-5425
We guarantee that Slick 50 Advanced Formula Engine Treatment will provide added protection against friction and wear as claimed by Slick 50 Products Corporation. If for any reason you are not satisfied with the performance of Slick 50, we will refund the full purchase price.
Compatible with all Motor Oils.
Will not void manufacturers' warranties.
Will not clog oil filter.
Works in Gasoline or Diesel Engines.
PROTECT YOUR ENVIRONMENT
Please dispose of used motor oil at an EPA approved disposal or recycling facility
Made in The U.S.A.
SLICK 50
THE ENGINE LIFE EXTENDER
SLICK 50
ADVANCED FORMULA
ENGINE TREATMENT
Extends Engine Life
with Slick 50 Technology
and Du Pont Teflon PTFE
Reduces friction, heat & wear
#1 The best engine treatment
(See test results on back)
1 U.S. QUART (.946 liter)

EXHIBIT F


WHY SLICK 50 IS BETTER
PROTECTS BETTER THAN ORDINARY MOTOR OIL
When you turn off your engine, virtually all your motor oil drains down into the pan, leaving critical parts unprotected. After a few hours, when you turn the key and drive, metal grinds against metal. This is when up to 80 percent of all engine wear occurs. THERE'S ONE SOLUTION. Slick 50's unique formula with Du Pont Teflon® PTFE resins is proven to bond to metal engine parts, protecting them better than ordinary motor oil.
START UP PROTECTION
TREATS THE ENGINE, NOT THE OIL
Using Du Pont Teflon in our own Engine Strength® formula, Slick 50 bonds an anti-wear surface to your engine that won't drain away with your oil. Other engine treatment products may contain Teflon, but they haven't proven that they can protect and work for 50,000 miles. IF IT DOESN'T BOND LIKE SLICK 50, IT DOESN'T WORK LIKE SLICK 50.
50,000 MILE PROTECTION
REDUCES DAMAGING FRICTION AND HEAT
By creating an anti-wear surface inside your engine, Slick 50 reduces friction and wear. Less friction means less heat in the critical parts of your engine.
UNTREATED
TREATED WITH SLICK 50
MAKES ENGINES LAST LONGER
Less heat and wear on critical parts means better long term performance and cooler running. This lowers your risk of costly engine repairs, rebuilds, and expensive breakdowns.
ONLY SLICK 50 HAS PASSED ALL FOUR OF THESE CRITICAL ENGINE TESTS:
INDUSTRY RECOGNIZED TESTING
TEST
SLICK 50
DURA-LUBE
STP
T-PLUS
Wear
Pass
Fail
Friction
Pass
Fail
Cold Start
Pass
THEY HAVE NEVER TESTED!
50,000 Mile
Pass
PROVEN THE BEST.
WEAR REDUCTION TEST
Industry Recognized Ball-On-Cylinder Test
SLICK 50
Actually reduces wear
PREMIUM MOTOR OIL
DURA-LUBE
STP
T-PLUS
In industry recognized tests against premium motor oil and other engine treatments, Slick 50 tested BEST at reducing both friction and metal wear together.
50,000 MILE ENGINE WEAR TEST
Total Metal Loss on Top Rod Bearings
SLICK 50
Total Metal Loss: 3613 Grams
PREMIUM MOTOR OIL
Total Metal Loss: 6090 Grams
41% LESS WEAR ON TOP ROD BEARINGS
Industry recognized lab tests in real engines, under real operating conditions, prove Slick 50 significantly reduces wear for 50,000 miles. Slick 50 is the only engine treatment to have tested, passed and published the results of these stringent tests.
11301037
SLICK 50 PRODUCTS CORPORATION

**Count on Slick 50 to:**
- Reduce engine wear at start-up.
- Lower engine temperature by reducing friction.
- Improve horsepower.
- Increase gas mileage.
- Reduce toxic emissions.



**Your Petrolon Guarantee:**
All Petrolon products are guaranteed to perform as stated when used as directed by manufacturer.

Military specifications are MIL-L-2104-C MIL-L-46152-A.

SLICK 50

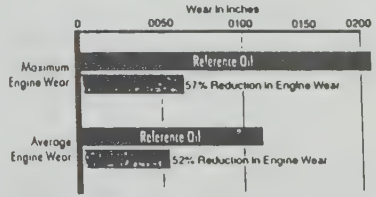
Slick 50 is a product of
Petrolon, Inc.*
Corporate Offices:
Petrolon Inc
11187 Brittmoore Road
Houston, TX 77043

Absolute
9/81
Estimated

**TEST RESULTS CONFIRM**
**MORE THAN**

# 50%

**WEAR REDUCTION**




**Slick 50 reduced wear by over 50%**

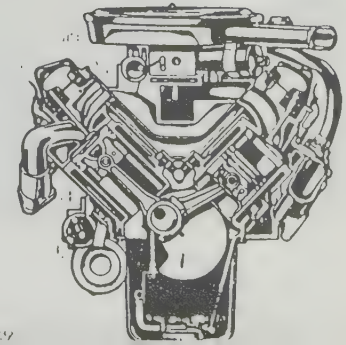
**Slick 50 Engine test Results**

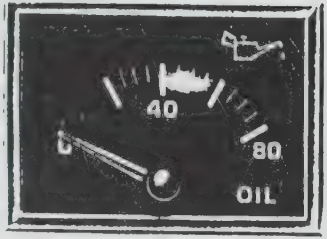
*Tests measuring maximum and average wear on engine parts conducted by an EPA-recognized independent laboratory using ASTM procedures showed Slick 50 Engine Treatment dramatically reduced engine wear up to 57% in maximum wear areas and 52% on average when compar[illegible] against wear on engine parts using known ASTM referenc[illegible]*

To order:

SLICK 50
The Engine Wear Protector.

# WHY STARTING YOUR ENGINE IS A TERRIBLE THING TO DO






At start-up, there's no oil in your engine, so exposed parts grind together

# At start-up, your oil's in the pan, not in the engine

**In fact, 70% to 80% of all mechanical engine wear happens in those critical seconds after you turn the key**

That's because as soon as your car's shut off, gravity begins pulling oil back into the pan along with any additives it contains. And after a few hours, no protective coating remains to lubricate your engine.

As a result, exposed mechanical engine parts grind together at start-up until oil can begin circulating again. And in those first critical seconds, permanent damage occurs.

## Slick 50. Protective treatment for one of life's biggest investments

For most families, buying a new car is a major expense. Plus, modern engines rev higher, run hotter and have closer tolerances than ever. So keeping them performing the way the manufacturer intended is more difficult and more costly than ever.

But not when you treat your car with Slick 50. Within 30 minutes, it begins to bond with metal parts creating a tough super slippery coating. One that can reduce engine wear for over 50,000 miles. Slick 50– the "ONE QUART, ONE TIME" engine treatment treats the engine ...not the oil.

## Slick 50 is easy to use

The next time you change your oil and filter, simply substitute one bottle of Slick 50 for the last quart of oil.

That's all there is to it. Unlike additives, Slick 50 does not have to be added every time you change

## Run cool even when the outside temperature's hot

Summer driving imposes extra strain on your car's engine. Temperatures are higher, so stop and go conditions take a greater toll. Vacation trips are longer. And pulling trailers and boats also add extra engine strain.

But because Slick 50 helps insulate engine parts from rubbing, there's less friction. As a result, your car runs cooler with far less danger of overheating.

## Over a billion miles of proof

So far Slick 50 has been successfully used in more than 15 million cars driven thousands of miles each.

It's performed in U.S. Government vehicles. It's been used by police departments. By commercial fleet owners. And by race car drivers. And tests by an EPA recognized independent laboratory show it can protect your car against engine wear, too.

**Slick 50 treats the engine...not the oil.**

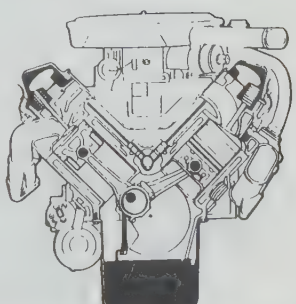
Slick 50 contains PTFE, the world's most slippery solid substance and the one with the greatest resistance to wear. PTFE also doesn't rust or corrode. It's immune to acids and alkalines. And the more pressure it's under, the more slippery it becomes.

**"ONE QUART, ONE TIME" protects and lubricates for more than 50,000 miles.**

EXHIBIT H

**Ud. puede contar con Slick 50 para:**

- Reducir el desgaste del motor al arrancar
- Bajar la temperatura del motor, reduciendo la fricción
- Mejorar la potencia del motor
- Aumentar el kilometraje
- Reducir las emisiones tóxicas



**Su garantía de Petrolon:**
Todos los productos de Petrolon están garantizados para funcionar de acuerdo con las especificaciones del fabricante si se siguen las instrucciones

Las especificaciones militares son MIL-L-2104-C, MIL-L-46152-A

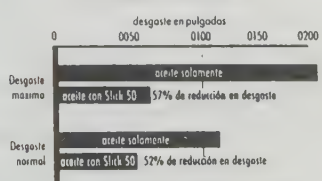
SLICK 50

Slick 50 is a product of
Petrolon Inc
Corporate Offices
Petrolon Inc
1187 Brittmoore Road
Houston TX 77043
Form #5108 0490

**RESULTADOS DE PRUEBAS**
**confirman una reducción de sobre**

# 50%

**de desgaste del motor.**




**SLICK 50 REDUCE EL DESGASTE SOBRE EL 50%**

**RESULTADOS DE LAS PRUEBAS DE SLICK 50**

*Pruebas midiendo el desgaste máximo y normal en piezas de motores, conducidas por un reconocido laboratorio independiente de la EPA, utilizando los procedimientos de la ASTM, mostraron que el tratamiento de motor, SLICK 50, dramaticamente redujo el desgaste en el motor sobre un 57% en areas de desgaste mayor y 52% en areas de desgaste normal, luego de ser comparadas con el desgaste en piezas de motores usando un aceite conocido por la ASTM solamente*

Su distribuidor de Slick 50 es:

SLICK 50
The Engine Wear Protector.

# ¿PORQUE ES PERJUDICIAL ARRANCAR EL MOTOR?

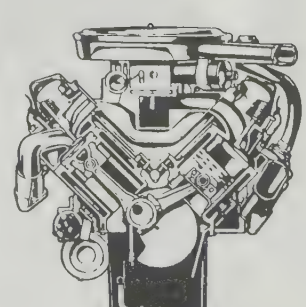
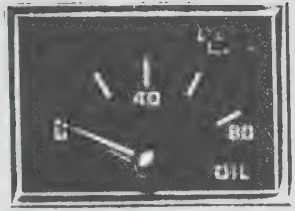


EXHIBIT H




Al arrancar el motor, ya no tiene aceite, por eso, las partes expuestas friccionan

# Al arrancar, el aceite se encuentra en la bandeja y no en el motor

**La verdad es que el 70 a 80% del desgaste mecánico del motor ocurre en estos segundos críticos cuando Ud. arranca el motor**

Esto pasa porque al apagar el coche, la gravedad empieza a jalar el aceite del motor hacia la bandeja junto con los aditivos que contenga. Y después de 4 horas, la capa protectora no se queda para lubricar el motor.

A consequencia de esto, las partes mecánicas del motor expuestas friccionan al momento del arranqe hasta que el aceite vuelve a circular. Y es en estos primeros momentos críticos cuando ocurre el daño permanente.

## Slick 50. Un tratamiento protector de una de las inversiones más grandes de su vida

Para la familia, la compra de un auto nuevo es un gasto mayor. Además, los motores modernos dan más revoluciones por segundo que antes, funcionan con temperaturas más elevadas, y tienen un nivel de tolerancia más bajo que nunca. Así que es aun más difícil y más caro garantizar el rendimiento como debería ser.

Pero no es así cuando cuida su motor con Slick 50. En menos de 30 minutos, Slick 50 empieza a adherirse con las partes metálicas formando una capa super lubricante, una capa que puede reducir el desgaste de su motor por más de 50,000 millas. Slick 50– "un cuarto, sólo una vez". Un tratamiento para el motor no para el aceite.

## Slick 50 es facil de usar

La próxima vez que Ud. haga su cambio de aceite y de filtro, simplemente sustituya el último cuarto de aceite por un bote de Slick 50.

Eso es todo lo que necesita Slick 50, no como los aditivos, no se tiene que agregar en cada cambio de aceite. Funciona a baja temperatura aun cuando hace mucho calor.

## Maneje sin problemas aun cuando hace mucho calor

Manejar en el verano hace que el motor se esfuerze más. Y como hace mucho calor, las paradas continuas desgastan el motor. Los viajes de vacaciones son largos y jalando remolques y barcos también causa un gran desgaste.

Pero como Slick 50 ayuda a aislar las partes del motor y prevenir el roce, hay menos fricción. Por eso, el coche trabaja a temperatura más baja y con menos riesgo de calentarse

## Más de un billón de millas de pruebas

Hasta ahora Slick 50 ha tenido éxito en su uso en más de 15 millones de carros manejados durante de miles de millas.

Slick 50 ha sido usado en vehículos del gobierno de los E.E.U.U., vehículos de la policía, en los vehículos de las compañías de transporte y en las carreras automobilísticas. Y pruebas por un laboratorio independiente reconocido por la Agencia de Proteccion del Medioambiente (EPA) muestran que Slick 50 puede proteger también su carro del desgaste

## Slick 50–Un tratamiento para el motor...no para el aceite.

Slick 50 contiene PTFE, la substancia sólida más resbaladiza en el mundo. Y la única con la mayor resistencia al desgaste. PTFE no se oxida a [illegible] y protegido contra acido y alkalinos. [illegible]

**Un cuarto, sólo una vez. Protege por más de 50,000 millas**

EXHIBIT I

# Product Benefits

Slick 50 Automotive Engine Formula significantly reduces wear on critical engine parts:

- Protects the engine at start-up, when substantial engine wear occurs.
- Reduces wear on engine parts operating under conditions of boundary lubrication (that is, making metal-to-metal contact), including the first and second piston rings.
- Reduces engine wear by up to 50 percent for 50,000 miles.
- Long term, by reducing engine wear, Slick 50 Automotive Engine Formula can contribute to lower maintenance and repair costs and to extended engine life. By reducing ring wear, it also has the potential to reduce automotive emissions.

Exhibit I

## DECISION AND ORDER

The Federal Trade Commission having issued its complaint charging the predecessor corporations of the respondents named in the caption hereof with violation of Section 5(a) of the Federal Trade Commission Act, as amended, and the respondents' predecessors having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the complaint issued by the Commission.

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Blue Coral, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1215 Valley Belt Road, Cleveland, Ohio.

2. Blue Coral-Slick 50, Inc. is a wholly-owned subsidiary of Blue Coral, Inc., organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 225 E. John Carpenter Freeway, Irving, Texas.

3. Blue Coral, Inc. is the general partner in Blue Coral-Slick 50, Ltd., a limited partnership, with its principal office located at 1385 West 2200 South, Salt Lake City, Utah. Its certificate of limited partnership is filed with the State of Ohio.

4. Blue Coral, Inc., Blue Coral-Slick 50, Inc., and Blue Coral-Slick 50, Ltd. are successors-in-interest to the four corporations named as respondents in the Federal Trade Commission's complaint

against Quaker State - Slick 50, Inc., Slick 50 Management, Inc., Slick 50 Products Corp., and Slick 50 Corp.

5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

*"Slick 50"* shall mean the aftermarket motor oil additive known as Slick 50 Automotive Engine Formula, Slick 50 Advanced Formula Engine Treatment, or any Slick 50 trademarked product of substantially similar composition.

*"Motor oil product"* shall mean a product for use in conjunction with or in place of fully formulated motor oil.

*"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

### I.

*It is ordered*, That respondents Blue Coral, Inc. and Blue Coral-Slick 50, Inc., corporations, and Blue Coral-Slick 50, Ltd., a limited partnership, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of Slick 50, or any substantially similar motor oil product containing polytetrafluoroethylene (hereinafter "PTFE"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Automobile engines generally have little or no protection from wear at or just after start-up unless they have been treated with such product;

B. Automobile engines commonly experience premature failure caused by wear unless they are treated with such product; or

C. Such product coats engine parts with a layer of PTFE; provided however, that this provision shall not prohibit any claim that relates to chemical or physical reactions between Slick 50 and metal surfaces of engine parts that is substantiated by competent and reliable scientific evidence.

II.

*It is further ordered*, That respondents Blue Coral, Inc. and Blue Coral-Slick 50, Inc., corporations, and Blue Coral-Slick 50, Ltd., a limited partnership, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of Slick 50, any other engine lubricating product used in a motor vehicle and sold under the Slick 50 trademark, or any engine treatment or oil additive, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, in any manner, directly or by implication:

1. That such product meets military specifications or the requirements, standards, or specifications of any other governmental or private organization; or

2. The existence, contents, validity, results, conclusions, or interpretations of any test or study.

B. Making any representation, in any manner, directly or by implication:

1. That, compared to motor oil alone, such product:

a) Reduces engine wear;
b) Reduces engine wear by more than 50%, by up to 50%, or by any other specific quantity;
c) Reduces engine wear at start-up;
d) Extends the duration of engine life; or
e) Lowers engine temperatures, reduces toxic emissions, increases gas mileage, or increases horsepower;

2. That one or any other number of treatments of such product reduces engine wear for 50,000 or any other number of miles;

3. That such product has been used in a significant number or any other number of U.S. Government vehicles; or

4. Regarding the performance, benefits, efficacy, attributes or use of such product,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

III.

*It is further ordered*, That respondents Blue Coral, Inc. and Blue Coral-Slick 50, Inc., corporations, and Blue Coral-Slick 50, Ltd., a limited partnership, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of any lubricating product used in a motor vehicle and sold under the Slick 50 trademark, other than any engine lubricating product, including but not limited to any fuel treatment, transmission fluid, or brake fluid, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that such product:

A. Reduces wear on any motor vehicle part;
B. Extends the duration of any motor vehicle part's life;
C. Lowers engine temperatures;
D. Reduces toxic emissions;
E. Increases gas mileage; or
F. Increases horsepower,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

IV.

*It is further ordered*, That, for five (5) years after the last date of dissemination of any representation covered by this order, respondents, their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials setting forth any representation covered by this order;

B. All materials that were relied upon to substantiate any representation covered by this order; and

C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control, or of which they have knowledge, that contradict, qualify, or call into question such representation or the basis upon which respondents relied for such representation, including complaints from consumers or governmental entities.

V.

*It is further ordered*, That respondents, their successors and assigns, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising under this order.

VI.

*It is further ordered*, That respondents, their successors and assigns, shall forthwith distribute a copy of this order to each of their operating divisions and to each of their officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order, and shall obtain from each such person or entity a signed statement acknowledging receipt of the order.

VII.

*It is further ordered*, That respondents, their successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, send by first class certified mail, return receipt requested, to each purchaser for resale of Slick 50 with which respondents have done business since January 1, 1993, notice of this order in the form attached as Attachment A. The mailing shall not include any other documents; and

B. In the event that respondents receive any information that subsequent to its receipt of notice of this order any purchaser for resale is using or disseminating any advertisement or promotional material specified in Attachment A, respondents shall: (1) immediately send such purchaser for resale a letter requesting that it stop using or disseminating any item specified in Attachment A and notifying it that the respondents will report its use or dissemination of any item specified in Attachment A to the Commission; and (2) within thirty (30) days notify the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, in writing, of such purchaser for resale's identity and its use or dissemination of any item specified in Attachment A.

VIII.

*It is further ordered*, That respondents, their successors and assigns, shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. Copies of all signed statements obtained from persons or entities pursuant to part VI of this order;

B. Copies of all notification letters sent to purchasers for resale pursuant to subparagraph A of part VII of this order; and

C. Copies of documents sufficient to show any redress made available to consumers pursuant to any class action lawsuit pending against respondents or any of their affiliates, which challenges conduct similar to that challenged by the Commission in this proceeding.

IX.

*It is further ordered*, That respondents, their successors and assigns, shall provide notification of all proposed class action settlement terms relating to any class action lawsuits pending against respondents or any of their affiliates, which challenges conduct similar to that challenged by the Commission in this proceeding, to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, in writing, at least ten (10) days before any such proposed settlement is submitted to a court for final approval.

X.

*It is further ordered*, That this order will terminate on December 9, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XI.

*It is further ordered*, That respondents, their successors and assigns, shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied or intend to comply

with this order; and, every ninety (90) days after final court approval of any settlement of a class action lawsuit which challenges conduct similar to that challenged by the Commission in this proceeding, file with the Commission a report, in writing, disclosing the amount of consumer redress made available by the respondents pursuant to such settlement, until such time as the respondents have satisfied their obligation to make available redress pursuant to any such settlement.

Commissioner Anthony not participating.

ATTACHMENT A

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED
[To be printed on respondents' letterhead]

[date]

Dear [purchaser for resale]:

As you may be aware, on July 12, 1996, the Federal Trade Commission ("FTC") issued a complaint against Quaker State - Slick 50, Inc., Slick 50 Management, Inc., Slick 50 Products Corp., and Slick 50 Corp.

In its complaint, the FTC alleged that advertisements for Slick 50 Engine Treatment ("Slick 50") have made false and unsubstantiated claims that: (1) Automobile engines generally have little or no protection from wear at or just after start-up unless they have been treated with Slick 50; (2) Automobile engines commonly experience premature failure caused by wear unless they are treated with Slick 50; (3) Slick 50 coats engine parts with a layer of PTFE; and (4) Slick 50 meets military specifications for aftermarket motor oil additives.

The FTC also alleged that advertisements for Slick 50 have made unsubstantiated claims that, compared to motor oil alone, Slick 50: (1) Reduces engine wear; (2) Reduces engine wear by more than 50%; (3) Reduces engine wear by up to 50%; (4) Reduces engine wear at start-up; (5) Extends the duration of engine life; (6) Lowers engine temperatures; (7) Reduces toxic emissions; (8) Increases gas mileage; and (9) Increases horsepower. In addition, the FTC alleged that Slick 50 advertisements made unsubstantiated claims that: (1) One treatment of Slick 50 continues to reduce engine wear for 50,000 miles; and (2) Slick 50 has been used in a significant number of U.S. Government vehicles.

Finally, the FTC alleged that Slick 50 advertisements falsely claimed that tests prove that, compared to motor oil alone, Slick 50: (1) Reduces engine wear by more than 50%; (2) Reduces engine wear by up to 50%; and (3) Reduces engine wear at start-up; and that tests prove that one treatment of Slick 50 continues to reduce engine wear for 50,000 miles.

On December 9, 1997, the FTC issued a consent order to cease and desist which prohibits certain claims for Slick 50. We consented to the issuance of the order for settlement purposes only and without admitting any of the FTC's allegations that we violated the law. The order requires us to request that our distributors and wholesalers stop using or distributing advertisements or promotional materials containing claims challenged by the FTC. As one of our distributors or wholesalers, we are required to send [purchaser for resale] this letter.

Specifically, the FTC order prohibits us in the future from making claims that (1) Automobile engines generally have little or no protection from wear at or just after start-up unless they have been treated with Slick 50; (2) Automobile engines commonly experience premature failure caused by wear unless they are treated with Slick 50; and (3) Slick 50 coats engine parts with a layer of PTFE. The order also requires that we have a reasonable basis for any performance claims we make for Slick 50 Engine Treatment or other engine lubricating product sold under the Slick 50 trademark, as well as any engine treatment or oil additive. In addition, it requires that we have a reasonable basis for certain specific claims we make for other lubricating products sold under the Slick 50 trademark.

We request your assistance by asking you to discontinue using, distributing, or relying on any of your advertising or promotional material for Slick 50 Engine Treatment received from us prior to July 1, 1997. Please also notify any of your customers who resell these products and who may have such materials to discontinue using those promotional materials. If we receive information that you are continuing to use those materials, we are required to notify the FTC of your failure to comply with this request.

Under separate cover, we will be sending you replacement promotional material that you will be able to use.

Thank you very much for your assistance.

Sincerely,

[name]
President
[respondents]

IN THE MATTER OF

# COOPER INDUSTRIES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3469. Consent Order, Oct. 26, 1993--Modifying Order, Dec. 15, 1997*

This order reopens a 1993 consent order -- that required the respondent to divest certain assets and to license certain technology for manufacturing industrial fuses -- and this order modifies the consent order by setting aside provisions of the consent order which required Cooper to license and divest low-voltage industrial fuse technology that it gained in its acquisition of Brush Fuses, Inc.; and by substituting a provision requiring prior Commission approval of certain acquisitions with a provision requiring prior notification.

## ORDER REOPENING AND MODIFYING ORDER

### I. THE COMPLAINT AND ORDER

On August 15, 1997, Cooper Industries, Inc. ("Cooper"), the respondent named in the above-referenced consent order ("order") issued by the Commission on October 26, 1993, filed its Petition to Reopen and Vacate Consent Order ("Petition"). Cooper asks that the Commission reopen and vacate the order pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC" Act"), 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, based on changed facts and the public interest and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").[1] The thirty-day public comment period on Cooper's Petition ended on September 15, 1997. No comments were received.

The Commission has determined to grant, in part, Cooper's Petition by reopening the order and modifying it to set aside the requirements of paragraph II through VII, but to deny the request to vacate the order. Rather, the Commission has determined to substitute for the prior approval requirement of paragraph VIII the prior notification and waiting period requirements of Section 7A of the Clayton Act, 15 U.S.C. 18a, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, for all non-HSR reportable

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

acquisitions otherwise meeting the specifications of paragraphs VIII and IX. This modification therefore eliminates the need for the separate prior notification requirement of paragraph IX, and the Commission has determined to set aside that paragraph.

The complaint in this matter alleges that Cooper's agreement to acquire the Fusegear Group, including Brush Fuses, Inc. ("Brush"), from BTR plc violated Section 5 of the FTC Act, and that the acquisition of the Fusegear Group, including Brush, would violate Section 5 of the FTC Act and Section 7 of the Clayton Act, 15 U.S.C. 18, by lessening competition and tending to create a monopoly in the market for low voltage industrial fuses ("LVI Fuses") in the United States.

The resulting order became final on October 29, 1993.[2] Paragraph III of the order requires Cooper to grant a license within twelve months to a licensee, who has received prior approval by the Commission, to obtain and use the LVI Fuse Technology and Know-how to manufacture any and all types of LVI Fuses that had been manufactured by or for Brush and sold within the United States within the last three years prior to the acquisition of Brush by Cooper ("License"). Paragraph II orders Cooper to divest the Brush Assets to the licensee, but only to the extent the licensee chooses to acquire those assets. Paragraphs IV and V contain additional requirements related to maintaining the Brush Assets pending divestiture and to an interim supply agreement. Paragraph VI provides for the appointment of a trustee should Cooper fail to grant the License and divest within the requisite period, and paragraph VII specifies Cooper's notification and reporting obligations. The purpose of the License and divestiture is to remedy the lessening of competition in the LVI Fuse market and to assist the licensee to manufacture, distribute, and sell a full line of LVI Fuses.[3] Cooper failed to grant the License within the time required, and the Commission approved the appointment of a trustee, on February 12, 1996. The trustee also failed to grant the License before his term expired on February 15, 1997.

## II. THE PETITION

In its Petition, Cooper describes its and the trustee's efforts to license and asserts, with supporting affidavits,[4] that despite these efforts, a licensee for the LVI Fuse Technology and Know-how has

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[2] 116 FTC 1243 (1993).

[3] Order ¶¶ II and III.A.

[4] Affidavits of James R. Deen, Associate General Counsel, and Homer Blalock, Trustee.

not been found. Cooper believes that the value of the License and related assets now is reduced to such an extent that "no willing buyer is likely to come forward."[5] It also asserts that the prior approval and prior notice requirements of the order are "unique" and that "there is no 'credible risk' that Cooper will undertake an anticompetitive and unreportable transaction." Cooper further argues that the *de minimis* nature of less that $3.5 million sales specified in paragraph IX is *prima facie* evidence of the Commission's lack of concern about such acquisitions and that, therefore, such prior notification is unnecessary.

III. STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. (unpublished) ("Hart Letter").[6]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5.; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order.[7] For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order. *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also

[5] Petition at 11.

[6] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

[7] Letter to Joel E. Hoffman, Damon Corp., C-2916 [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207 at 22,585 (March 29, 1983)("Damon Letter").

will consider whether the particular modification sought is appropriate to remedy the identified harm. *Id.* at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.[8]

## IV. REOPENING AND MODIFYING THE ORDER IS IN THE PUBLIC INTEREST

As Cooper described in its Petition, supported by the required affidavits, it and the trustee seemingly have done all that is possible to grant the License. Immediately after the order became final, Cooper notified all those companies thought to be likely potential acquirers of the License that the License was available. The availability of the License also was widely advertised, first by Cooper and then by the trustee. Although both Cooper and the trustee received serious inquiries, each of the initially interested parties declined to pursue the License after performing a more detailed evaluation. Cooper asserts that now, more than four years since the order became final, the value of the License and related assets is reduced to such an extent that "no willing buyer is likely to come forward."[9]

Although the fact that the passage of time has reduced the value of the assets was foreseeable and thus does not constitute the change

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[8] *See Federated Department Stores, Inc. v. Moitie,* 425 U.S. 394 (1981)(strong public interest considerations support repose and finality).

[9] Petition at 11.

in fact necessary to justify reopening the order, it would be futile to continue to require Cooper to grant a License and inequitable to require it to keep paying a trustee to attempt the same. Accordingly, Cooper has demonstrated an affirmative need to reopen the order.

In balancing whether Cooper has demonstrated that the reasons to set aside the licensing, divestiture, and related requirements outweigh the need to continue to impose these obligations on Cooper, the Commission notes that the purpose of the order was to increase competition by granting a License to a licensee to manufacture, distribute, and sell a full line of LVI Fuses. Such a licensee could not be found, and the evidence indicates that the value of the License is now so reduced that such a licensee will not be found, regardless of the additional effort. The diligent attempts of the trustee to market the License demonstrate that further attempts to license, even at no minimum price, are likely to be fruitless.[10] Because there is no need to continue to require Cooper either to attempt to grant a License or to maintain the Brush Assets (as it has since those assets were acquired), the divestiture obligations of the order should be set aside.

## V. PRIOR APPROVAL POLICY STATEMENT

In its Petition, Cooper also asks the Commission to vacate the prior approval and prior notification provisions of paragraphs VIII and IX. Paragraph VIII and paragraph IX together prohibit Cooper, for ten years, from making any acquisition of interests in or assets of specified entities without either the prior approval of the Commission or HSR-type prior notification. The value of the acquired entity's sales of LVI Fuses in each of the three years preceding such acquisition determines whether prior approval or prior notification is required. Cooper contends that these prior approval and prior notice requirements are unique and asserts that prior approval is unwarranted because "there is no 'credible risk' that Cooper will undertake an anticompetitive and unreportable transaction."[11] It adds that the *de minimis* level of sales that triggers paragraph IX's prior notification provision is *prima facie* evidence that the Commission was particularly unconcerned about such acquisitions, and, therefore, that prior notification also is unwarranted.[12]

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[10] The respondent made the same showing in Promodes, S.A., Docket No. 9228, in which the trustee accomplished divestiture of only some of the supermarkets to be divested. Order Granting Request to Reopen and Modify, 117 FTC 37 (1994).

[11] Petition at 14.

[12] *Id.*

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of the HSR Act to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . .[the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The presumption is that setting aside the prior approval requirement of paragraph VIII is in the public interest. The record contains no evidence suggesting that this matter presents the limited circumstances identified in the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, *i.e.*, a credible risk that, but for the prior approval provision, the respondent would attempt the same or approximately the same merger.

Prior notification, however, is appropriate for acquisitions that fall below the HSR threshold for the relevant market because the acquisition in this matter was just such a non-reportable acquisition, acquisitions of LVI Fuses from other producers are still possible, and, thus, a credible risk exists that Cooper could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. Cooper argues that the *de minimis* level of acquisitions requiring paragraph IX prior notification shows that the Commission has no concern for such acquisitions, but Cooper has presented no facts to support that assertion. Although such small acquisitions may not have required prior approval, they raise potential antitrust concerns sufficient to require prior notification. Accordingly, prior notification should be required for all acquisitions and may now be incorporated in one paragraph.

Accordingly, *It is ordered*, that this matter be, and it hereby is, reopened; and

*It is further ordered*, That the order be, and it hereby is, modified to set aside paragraphs II through VII and paragraph IX, as of the effective date of this order; and

*It is further ordered*, that paragraph VIII of the order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

*It is further ordered*, That for ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, which manufactures (either directly or indirectly), and sells the Relevant Product (other than sales to subsidiaries or divisions of the concern) in or into the United States; or

B. Acquire any assets used for, or previously used for (and still suitable for use for) the manufacture and sale in or into the United States of the Relevant Product from any concern, corporate or non-corporate, except in the ordinary course of business.

On the anniversary of the date on which this order becomes final, and on every anniversary thereafter for the following nine (9) years, Cooper shall file with the Commission a verified written report of its compliance with paragraph VIII of the order.

The prior notifications required by this paragraph VIII shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Commissioner Starek concurring in the result only.

IN THE MATTER OF

# WEIGHT WATCHERS INTERNATIONAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9261. Complaint, Sept 24, 1993--Decision, Dec. 24, 1997*

This consent order requires, among other things, the New York-based corporation to provide certain types of evidence to substantiate future weight loss and weight loss maintenance claims; requires disclosure statements regarding the actual maintenance experience of the customers; and requires in some instances that testimonials concerning weight loss or maintenance success contain a statement reflecting the generally expected success for program participants or indicate that dieters should not expect to experience similar results.

## *Appearances*

For the Commission: *Ronald Waldman* and *Michael Bloom*.

For the respondent: *Keith Pugh* and *Edward Henneberry, Howrey & Simon*, Washington, D.C. and *Robert Hollweg*, Woodbury, N.Y.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Weight Watchers International, Inc., a corporation (hereinafter "Weight Watchers" or "respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Weight Watchers International, Inc. is a Virginia corporation, with its principal office or place of business at 500 N. Broadway, Jericho, New York.

PAR. 2. Respondent has advertised, offered for sale, and sold weight loss and weight maintenance services and products, including 1000 to 1500 calorie-a-day weight loss programs which it makes available to consumers at numerous company-owned and franchised "Weight Watchers" centers nationwide.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for the Weight Watchers weight loss program, including but not necessarily limited to the attached Exhibits 1 through 21.

SUCCESS CLAIMS

PAR. 5. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits 1 through 17, contain the following statements:

(a) Quick, successful weight loss. [Exhibit 1]

(b) The feelings of success cultivated during the early weeks of the Program foster the self-efficacy needed to see weight-loss goals to fruition. Therefore, Weight Watchers members not only lose weight successfully, they learn the necessary skills to keep it off for a lifetime. Through the cultivation of healthy eating and exercise habits, and the implementation of strategies for dealing with challenging weightless situations, our members learn to make proper weight management a lifelong habit. [Exhibit 2]

(c) Our program not only helps you slim down, it helps you stay that way. You'll learn how to eliminate the habits that have contributed to unwanted weight gain and replace them with constructive ones . . . .

Weight Watchers has already helped more than 30 million people around the world lose weight. In our At Work program you, too, will shed pounds with our medically approved program . . . . Explores food-related behavior patterns and helps you establish healthy eating and exercise habits so that you not only lose weight but also maintain the loss . . . .

At each At Work Program meeting you will receive additional weight-loss tools that make it easier to reach and maintain your goal weight. . . . Most importantly, you'll be setting the foundation for a lifetime of successful weight management, joining the tens of thousands of people who have reached and maintained their goal weights through our program. [Exhibit 3]

(d) As a Weight Watchers member, you'll discover an infinite number of choices. Best of all, you'll find that you control your diet; your diet does not control you. And when you've reached the weight you want, we'll show you how to stay there for the rest of your life. . . .

At Weight Watchers, you will lose weight at the pace that is best for you on a diet of foods you'll be able to eat for the rest of your life. [Exhibit 4]

(e) We pride ourselves on providing a state-of-the-art Program that works.... That's why the Weight Watchers program is a safe and healthy route to permanent weight loss. . . .

We're sure you'll agree that the Weight Watchers program is an investment in the future. The new knowledge, attitudes, and values you develop will last a lifetime for a slimmer, happier, healthier you. [Exhibit 5]

(f) Lose fast with results that last. [Exhibit 6]

(g) Its [sic) our most livable, effective way to lose weight ever. So hurry and join Weight Watchers. That way you'll learn how to lose weight and maintain it for a lifetime. [Exhibit 7]

(h) HUNGRY FOR A WEIGHT LOSS PROGRAM THAT REALLY WORKS? WEIGHT WATCHERS WORKS FOR A LIFETIME [Exhibit 8]

(i) Trusting a weight loss program.

Weight Watchers has been in business for 27 years. We don't rely on fads or gimmicks--just a safe, sensible approach to weight loss, based on sound nutrition, that works. And with our new 1991 Personal Choice Program, you decide the plan that's best for your lifestyle. You eat real food . . . and set your own pace. With the support you need to lose the weight and keep it off--all for just $10 a week. [Exhibit 9]

(j) Our Unique Four-Way Approach to Weight Loss

The new Quick Success program--it's not a diet, it's a total weight-loss package. Using our proven four-way approach, you'll progress toward one ultimate goal-permanent weight loss. Here's how it works . . . . [Exhibit 10]

(k) If you're having a hard time losing weight, chances are the problem isn't lack of willpower. It's what you're forced to eat.

That's why our Personal Choice Program works so well: You get a wide variety of delicious real foods, including treats like pizza and chocolate cake. What's more, you can choose the foods you like. We'll show you how.

With a Program this flexible, we know you'll find the power within you to lose weight. And there's a Weight Watcher's meeting near you to help.[Exhibit 11]

(l) Mary Mach, Lost 91 lbs./maintained for 16 years.
IT WORKS! [Exhibit 12]

(m) Jeanie Darnell Lost 77 lbs./maintained for 2 years.
IT WORKS! [Exhibit 13]

(n) I can't believe it. I ate pizza with my kids, the same meals I cooked for my family, and even had a snack with my coffee. And you know what? I lost every single pound I wanted to. . . .
What's more, because I can live with this program, I stuck to it and reached my goal. [Exhibit 14]

(o) Tracy Burgess, before. Tracy Burgess, after. . . .
Want proven results? Join Weight Watchers today. [Exhibit 15]

(p) [W]e've helped millions and millions of people lose weight. And learn how to keep it off, year after year after year. [Exhibit 16]

(q) If it's a smaller figure you're after, we've got one. With this terrific offer, it's a great time for you to join Weight Watchers and get one of your own.

You'll learn how to eat real foods right away. Handle real-life challenges. And develop permanent habits that won't just help you reach your goal weight. They'll help keep you there.

So take advantage of our great offer today. While your smaller figure may last forever, ours won't. So hurry and join Weight Watchers today. [Exhibit 17]

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 1 through 17, respondent has represented, directly or by implication, that:

(a) Weight Watchers customers typically are successful in reaching their weight loss goals;

(b) Weight Watchers customers typically are successful in maintaining their weight loss achieved under the Weight Watchers diet program; and

(c) Overweight or obese Weight Watchers customers typically are successful in reaching their weight loss goals and maintaining their weight loss either long-term or permanently.

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 1 through 15, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph six, respondent possessed and relied upon a reasonable basis that substantiated those representations.

PAR. 8. In truth and in fact, at the time it made the representations set forth in paragraph six, respondent did not possess and rely upon a reasonable basis that substantiated those representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

20% FASTER WEIGHT LOSS CLAIMS

PAR. 9. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits 18 through 21, contain the following statements:

(a) GREAT SAVINGS ON FASTER WEIGHT LOSS.
PROVEN-EFFECTIVE, TOO!

Research proved it! Last year's Quick Success Program melted pounds 20% faster than before. And this year's New 1989 Quick Success Program is even better, thanks to an easier-to-use food plan, an expanded and simplified optional exercise plan and that wonderful meeting experience . . . . Come prove to yourself what we already know -- this is the program you can count on [Exhibit 18]

(b) Last year alone, this proven effective program [the "Quick Success Program"] helped millions of members take off weight over 20% faster than ever. This year, it's even easier. [Exhibit 19]

(c) THE PROVEN-EFFECTIVE WAY TO LOSE WEIGHT FASTER.
Research proved last year's Quick Success Program melted pounds 20% faster than before. And now it's even easier to lose weight that fast! [Exhibit 20]

(d) Learn about our fastest-ever weight loss program!

Research proves our Quick Success Program works 20% faster than before. And this year, it's new and even better, with a revised, easier-to-follow food plan and an expanded optional exercise plan. [Exhibit 21]

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 18 through 21, respondent has represented, directly or by implication, that:

(a) Participants in Weight Watchers' 1988 "Quick Success" weight loss program lost weight 20% faster than participants in weight Watchers' prior weight loss program;

(b) Participants in Weight Watchers' 1989 "Quick Success" weight loss program lost weight as fast or faster than participants in Weight Watchers' 1988 "Quick Success" weight loss program; and

(c) Participants in Weight Watchers' 1989 "Quick Success" weight loss program lost weight 20%, or more than 20%, faster than participants in Weight Watchers' 1987 weight loss program.

PAR. 11. In truth and in fact:

(a) Participants in Weight Watchers' 1988 "Quick Success" weight loss program did not lose weight 20% faster than participants in Weight Watchers' prior weight loss program;

(b) Participants in Weight Watchers' 1989 "Quick Success" weight loss program did not lose weight as fast or faster than participants in Weight Watchers' 1988 "Quick Success" weight loss program; and

(c) Participants in Weight Watchers' 1989 "Quick Success" weight loss program did not lose weight 20%, or more than 20%, faster than participants in Weight Watchers' 1987 weight loss program.

Therefore, the representations set forth in paragraph ten were and are false and misleading.

PAR. 12. Through the use of the statements and depictions contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 18 through 21, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph ten, respondent possessed and

relied upon a reasonable basis that substantiated those representations.

PAR. 13. In truth and in fact, at the time it made the representations set forth in paragraph ten, respondent did not possess and rely upon a reasonable basis that substantiated those representations. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. Through the use of the statements and depictions contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 18 through 21, respondent has represented, directly or by implication, that competent and reliable scientific evidence has proven that participants in Weight Watchers' 1988 "Quick Success" weight loss program lost weight 20% faster than participants in Weight Watchers' prior weight loss program.

PAR. 15. In truth and in fact, competent and reliable scientific evidence has not proven that participants in Weight Watchers' 1988 "Quick Success" weight loss program lost weight 20% faster than in Weight Watchers' prior weight loss program. Therefore, the representation set forth in paragraph fourteen was and is false and misleading.

COMPARATIVE PROGRAM CLAIMS

PAR. 16. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits 3 and 5, contain the following statements:

(a) We've adapted our proven weight-loss method--the world's most successful--to fit the high-pressure life-styles and hectic schedules of today's workplace. (Exhibit 3]

(b) We provide the most effective weight-loss methods and support for you to be successful, but you make it happen. [Exhibit 5]

PAR. 17. Through the use of the statements and depictions contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 3 and 5, respondent has represented, directly or by implication, that Weight Watchers weight loss programs are superior to other weight loss programs in enabling participants to achieve and maintain weight loss.

PAR. 18. Through the use of the statements and depictions contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 3 and 5, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph seventeen, respondent possessed and relied upon a reasonable basis that substantiated that representation.

PAR. 19. In truth and in fact, at the time it made the representation set forth in paragraph seventeen, respondent did not possess and rely upon a reasonable basis that substantiated those representations. Therefore, the representation set forth in paragraph eighteen was, and is, false and misleading.

PAR. 20. In providing advertisements referred to in paragraph four to its individual franchisees for the purpose of inducing consumers to purchase its weight loss services and products, respondent has furnished the means and instrumentalities to those franchisees to engage in the acts and practices alleged in paragraphs four through nineteen.

PAR. 21 The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT 1


How to Win a Food Fight
Join Weight Watchers® At Work Program®
Here. Where You Are.
• Quick, successful weight loss
• Group support
• Weekly on-site meetings
• Confidential weigh-ins
Look for our posters.
Weight Watchers®
THE AT WORK PROGRAM.®
EXHIBIT 1

# EXHIBIT 2



## APPROACH TO WEIGHT LOSS

The philosophy of the Weight Watchers program encompasses a multidisciplinary approach to weight loss via The Quick Success Program. This comprehensive intervention program consists of the following four strategies:

- Decreasing caloric intake through The Quick Success Food Plan. The Food Plan is a healthy eating plan based on a variety of readily available, wholesome foods. Nutritional adequacy is attained through proper food selection that may be adjusted within carefully prescribed guidelines in order to allow for individual ethnic habits and preferences, cost, and availability. Calories build progressively, starting at approximately 1,000 kilocalories per day for women on the first week and building to approximately 1,200 kilocalories by the fifth week.* Micronutrient nutrients are supplied in adequate amounts. 25-30% total fat, and Figure 1. The 15-20% breakdown shown in Figure 2 50-55% carbohydrate (predominantly complex) with complex carbohydrates, sodium, and simple sugar values, nutritional parameters meet with guidelines sanctioned by the American Heart Association and Canadian Heart Foundation, the American and Canadian Cancer Societies, and the American and Canadian Diabetes Associations. More importantly, the Food Plan is flexible enough to be adapted to any lifestyle, thereby increasing each member's likelihood of long-term success.
- Increasing caloric output through The Quick Success Exercise Plan. When exercise is used in conjunction with diet for weight loss, a higher percentage of net weight lost will be adipose tissue. In addition, the inclusion of an exercise prescription increases the likelihood that dietary management will succeed, and also offers physiological, psychological, and social advantages. The Quick Success Exercise Plan affords all Weight Watchers members, from the sedentary to the more active, the opportunity to benefit from increased physical activity at any or all of its four levels of exertion. Members may participate in one or more of five aerobic activities: Walking, Walking/Jogging, Stationary Bicycling, Outdoor Bicycling, and Swimming, at low to moderate levels (60-80% of age predicted maximum heart rate) in order to provide optimal calorie- and fat-burning benefits and minimal stress on bones and joints. We integrate these low-impact activities in our gentle, prudent approach to increasing physical activity in order to provide an enjoyable path to a more active life-style. Our Exercise Plan meets guidelines for the exercise component of

*Kilocalories increase from 1,100 to 1,600 for men and from 1,500 to 1,700 for youths.

MEANS

- Reshaping behavior through The Quick Success Self-Discovery Plan. The necessity for the overweight individual to develop, strengthen, and maintain a strong motivation to lose weight cannot be overemphasized. Without success in this area, weight-loss results will not be long-lasting. Using behavior modification and cognitive restructuring techniques, the Self-Discovery Plan promotes positive attitudes and actions. Delivered through a self-teaching module, this Plan teaches members necessary skills to change their eating and exercise behaviors and develop more positive self images. Through this Plan, members may work on such challenges as binge eating, self-defeating thoughts, and eating triggers, while striving toward a lifetime of controlled eating.
- Providing Inspiration through our Group Support System. On all associated conditions, the psychological burden linked with overweight may cause the most suffering. That is why Weight Watchers Support System, the soul of our weight-loss Program, emphasizes encouragement, motivation, and support are all cultivated through weekly meetings with a trained group leader who lost weight on, and still successfully uses, our Program, and fellow members who share the same weight-loss concerns. In this warm, supportive, and trusting environment, members learn the skills and build the confidence they need to successfully follow the Program. Plus, our comprehensive Quick Success Program is easier to follow than ever before, increasing participants' adherence and, subsequently, weight loss.

**FIGURE 1**

**Average Daily Nutrient Supply for Women Following the Week 8 Food Plan**

| | |
|---|---|
| Kilocalories | 1,200 |
| Protein | 65 grams |
| Carbohydrate | 160 grams |
| Fat | 25 grams |
| Calcium | 1,000 milligrams |
| Iron | 12 milligrams |
| Vitamin A | 2,000 R.E. |
| Vitamin C | 143 milligrams |
| Thiamin | 1.2 milligrams |
| Niacin | 14 milligrams |
| Riboflavin | 1.7 milligrams |
| Cholesterol | 250 milligrams |
| Sodium | 2,000 milligrams |

Note: Nutrient values for women may vary according to individual food choices; nutrient values for the Men and Teens Food Plan vary from above.

## Safe, Healthy, and Effective Weight Loss

Over the long term, our members average a one-half to one kilogram loss per week, with larger losses occurring in the first five weeks. In fact, our research shows that during the first 5 weeks of our new Quick Success Program, members lose 20% more weight than ever before. Additionally, our Exercise Plan works in conjunction with our Food Plan to promote maximum loss of adipose tissue while conserving lean body tissue.

## Long-Term Life-Style Changes

The feelings of success cultivated during the early weeks of the Program foster the self-efficacy needed to see weight-loss goals to fruition. Therefore, Weight Watchers members not only lose weight successfully, they learn the necessary skills to keep it off for a lifetime. Through the cultivation of healthy eating and exercise habits, and the implementation of strategies for dealing with challenging weight-loss situations, our members learn to make proper weight management a lifelong habit.

**FIGURE 2**

**Macronutrient Distribution of The Quick Success Food Plan (1,200 Kilocalories)**




*Represents 65 grams of protein which provides 12% of kilocalories from a 2,200 kilocalorie diet and 20% of kilocalories from a 1,200 kilocalorie diet.

## WEIGHT WATCHERS LINK IN THE HEALTH-CARE SYSTEM

Weight Watchers has a weight-loss service to meet everyone's needs. All are based on our proven Quick Success Program and provide safe, healthy, and effective weight loss.

- Our traditional group service — neighbors and friends meeting within their communities to share in their weight-loss efforts.
- Our convenient At Work Program — groups of fellow workers who meet right at their workplace.
- Our exclusive Inner Circle® — providing lots of personal attention to small groups of 8 to 12 members who share the same weight-loss concerns.

Weight Watchers provides low-cost weight loss implemented at the community level by specially trained staff members. Our unique approach is to offer private weighing and informational and inspirational group meetings. This way, we work hand in hand with other health-care services by providing weight-loss expertise and the team spirit, support, and encouragement that can best be provided in a group working through weight loss challenges together.

Weight Watchers welcomes any man, woman, or child (10 years or older) with at least 10 pounds to lose. While we are especially skilled at handling people with 40 pounds or more to lose, we are equally popular with individuals who are less than 20 pounds overweight. Our Program is informative, inspirational, and fun, and we have established an excellent reputation with your patients.

We recommend that every member seek her/his physician's approval before beginning our weight-loss Program, and ask your support by encouraging their participation and recognizing their progress. Our Program, a very palatable method of intervention, is designed to complement, not compete with, your medical/nutritional expertise. We have a weight-loss Program you can recommend with confidence.

Weight Watchers — the source for sensible weight loss.

EXHIBIT 3

# Let Weight Watchers Work For You... Where You Work!

You'd like to lose weight, but there's just not enough time to commit to a program that will help you succeed. Right? Wrong! The Weight Watchers At Work Program™ was designed with the needs of busy working people in mind.

We've adapted our proven weight-loss method—the world's most successful—to fit the high-pressure lifestyles and hectic schedules of today's workplace. And now, in cooperation with your employer, our expertise is available to you right where you work.

## The At Work Program offers unparalleled convenience.

Getting to At Work Program meetings couldn't be easier or more convenient. Meetings are held on company premises during your lunch break or before or after hours. So the usual deterrents—meetings, children, errands, exhaustion, lack of time—don't get in the way of your attendance.

## The At Work Program understands your needs.

We designed our program to accommodate the unique needs of working people. During our meetings, we'll show you how to:

- Cope with coffee breaks and candy machines.
- Brown bag with flair.
- Beat the after-work syndrome.
- Manage stress and maintain motivation.
- Take time out for yourself.

## The At Work Program is more than a diet.

The At Work Program is much more than a diet. It's a program that *fits* your lifestyle rather than requiring that you change it. Designed by a group of prominent medical, exercise, nutrition and psychological professionals, every facet of The At Work Program is geared to the special needs of working people who want to lose weight safely and effectively.

Our program not only helps you slim down, it helps you stay that way. You'll learn how to eliminate the habits that have contributed to unwanted weight gain and replace them with constructive ones. This doesn't mean you have to give up the foods you love. Our flexible food plan still has room for cheeseburgers, French fries, chocolate layer cake and other foods many people mistakenly think they have to give up. In fact, with the Weight Watchers® Program, no one will even know you're on a diet.

## The At Work Program starts with success.

Weight Watchers has already helped more than 30 million people around the world lose weight. In our At Work Program you, too, will shed pounds with our medically approved program comprising the following:

- FOOD PLAN—Promotes faster yet safe weight loss through portion control and an exchange system that enables you to eat the everyday foods you love—at work, at home and on the go.
- EXERCISE PLAN—Helps you slim down, firm up and feel good with a choice of five optional inch-shaving activities and four levels of participation tailored to your needs and preferences.
- SELF-DISCOVERY PLAN—Explores food-related behavior patterns and helps you establish healthy eating and exercise habits so that you not only lose weight but also maintain the loss.
- GROUP LEARNING AND SUPPORT—You'll get up-to-the-minute information about weight-related issues in an atmosphere of mutual support, inspiration and motivation that will help you and your co-workers stay on the road to successful weight control.

## The At Work Program continues with success.

At each At Work Program meeting you will receive additional weight-loss tools that make it easier to reach and maintain your goal weight. You'll learn that weight loss and delicious food go hand in hand and that eating well does not mean denying yourself the rewards you want for hard work. Most importantly, you'll be setting the foundation for a lifetime of successful weight management, joining the tens of thousands of people who have reached and maintained their goal weights through our program.

## The At Work Program means privacy and personal choice.

At Work Program members are weighed each week—in privacy. You're free to tell anyone you want how much weight you've lost and how proud you are, but we won't tell anyone without your consent. The same goes for meeting participation. You can actively participate or just sit back and learn from the experiences of your leader and fellow members.

## The At Work Program leaders care.

Genuine caring is one of the factors that helps At Work Program members succeed. Our leaders know how it feels to want to lose weight because they are all Weight Watchers success stories who themselves have met and maintained their weight-loss goals on our program. Their own experience makes them keenly aware of what you are experiencing, and you'll find that you benefit from their knowledge.

# EXHIBIT 4

EXHIBIT 4

## Enjoy a Slimmer Life Without Changing Your Lifestyle

Weight Watchers makes losing weight fast and flexible with a proven program based on the premise that you shouldn't have to change your lifestyle to lead a slimmer life. Many diets require you to alter your lifestyle. Some tell you what you can't eat; others tell you what you must eat. Many tell you when to eat, or when not to.

With Weight Watchers Fast and Flexible Program, you continue eating the foods you love the way you're accustomed to eating them. If you start your day with cereal and milk, you'll continue doing so. If you like to eat lunch at three in the afternoon, that's fine with us. Whatever your style of eating, whatever your schedule, you'll find it easy to follow the way you eat on Weight Watchers. That's true even if you're a vegetarian, or pregnant or a nursing mother.

## You Control Your Diet. Your Diet Doesn't Control You.

At Weight Watchers, you'll learn how to modify and control your eating habits so you can lose the weight you'd like while getting on with your hectic daily routine. You can go on vacation, attend cocktail parties, enjoy family celebrations—and no one has a clue you're trying to lose weight. In fact, on The Fast and Flexible Program, you'll be eating the foods you've always eaten and loved. Bring on the linguine with clam sauce, feast on mushroom-smothered steak and potatoes, delight in brownie a la mode.

As a Weight Watchers member, you'll discover an infinite number of choices. Best of all, you'll find that you control your diet; your diet does not control you. And when you've reached the weight you want, we'll show you how to stay there for the rest of your life.

## Easy To Use, Easy To Lose

If you think losing weight means eating boring prepackaged meals or requires endless counting and measuring rituals, here's some of the good news about Weight Watchers Fast and Flexible Program. It's completely different from the Basic Plan. It's the easiest, most flexible plan we've ever developed. And it's one of the main reasons they're so successful on Weight Watchers. We'll show you how to measure portions that will help you lose the weight you want and keep it off. We even have products that will help you do the necessary measuring faster and more easily.

As for the Weight Watchers foods you see at your supermarket, they're purely optional, and the choice of nutrition and weight-conscious people looking for both convenience and good taste.

## More for Your Money

With 37 years of experience helping millions of men and women lose weight safely, based on the latest scientific findings, Weight Watchers remains committed to developing the weight-loss needs of every member. That's why we've made Fast and Flexible the newest, most effective program we've ever offered.

It is also reflected in our fees. We require no contracts or long-term obligations. In fact, Weight Watchers—the world's most successful weight-loss organization—charges much less than most other weight-loss programs. And your weekly fee entitles you to attend as many meetings as you like—anywhere in the world.

## Faster Than You Think

When you're ready to lose weight, you want results, fast. But as most people who have tried to lose weight on a crash diet know, it's impossible. The fact is, crash weight-loss programs may show a quick return, but they don't provide for healthy weight loss, and you know what happens on return to real food and the real world.

The Weight Watchers Fast and Flexible Program encourages the fastest possible weight loss without sacrificing health, safety or delicious food. A diet that promises very rapid weight loss is a diet you should be very wary of. Other starving dynamic we does that maybe you to help meals, and those that do that is Weight Watchers. You will lose weight at a safe pace that is best for you on a diet of foods you'll be able to eat for the rest of your life.

## Group Learning and Support

Every leader has lost weight with Weight Watchers and is an individual success story. He or she will share information about weight-related issues in a motivational, highly supportive environment. You'll benefit from tips your leader picked up along the way to success as well as from concerns, helpful information prepared for you by Weight Watchers.

Per example, we'll show you how to read a label so you know exactly what you're eating and exactly how much fat it contains. And as you learn, you'll be supported by your leader and other members of your group who are sharing similar experiences. You can contribute as much or as little as you like to the discussion. And, of course, your weight is very private and confidential.

## Convenient Times, Convenient Places

You're out at the office...drive too many one position, you're out at home...Weight Watchers knows that for many busy people, the thought of another commitment or of rushing time can be a powerful deterrent to weight loss. For that reason, we make our schedule flexible enough to accommodate yours. And because there are so many Weight Watchers locations, you can always find a meeting near you when your schedule makes attendance at your regular meeting difficult. Whatever your schedule, yours and ours are likely to make a good match.

## The Exercise Factor

Exercise makes you feel better, helps you look better, and speeds up the weight-loss process. Weight Watchers optional exercise program was designed by leading health and physical fitness experts who specifically tailored it to help speed weight loss. It includes activities at several levels of participation to ensure that you can use the plan in a way that will best suit your goals and needs.

*If you're ready to lose weight, we're ready to help you succeed. Ask us to send you Basic Plan information. Or, if you're ready to begin Fast and Flexible Program right away, we'll send you the special telephone number for the Weight Watchers location nearest to you.*

EXHIBIT 5

EXHIBIT 5

## *Why Weight Watchers?*

Nothing succeeds like success, goes the old saying. And Weight Watchers has helped more people succeed at weight loss than any other weight-loss organization in the world.

Weight Watchers is the acknowledged leader among weight-loss and -control programs, bringing over a quarter century of knowledge and experience to members the world over. We pride ourselves on providing a state-of-the-art Program that works. Plus, our Program is regularly updated by experts in the fields of medicine, nutrition, exercise, physiology, and psychology who are at the forefront of new developments in the weight-loss field. With prudent cholesterol, sodium, and simple sugar values, our nutritional parameters meet with guidelines sanctioned by the American Heart Association and Canadian Heart Foundation, the American and Canadian Cancer Societies, and the American and Canadian Diabetics Associations. That's why the Weight Watchers program is a safe and healthy route to permanent weight loss.

Our Program contains a four-way approach: a Food Plan, an Exercise Plan, the Self-Discovery Plan®, and a Group Support System. These four facets of our Program mesh together to provide you with a personalized and enjoyable weight-loss experience, as well as a new way of thinking and living. We provide the most effective weight-loss methods and support for you to be successful, but *you* make it happen.

We're sure you'll agree that the Weight Watchers program is an investment in the future. The new knowledge, attitudes, and values you develop will last a lifetime for a slimmer, happier, healthier you.

## *Good Nutrition and Weight Loss: The Vital Link*

Some people might think good nutrition and weight loss have little in common. Nothing could be further from the truth. Permanent weight loss is best achieved through good nutrition, which is what the Weight Watchers program offers.

Our Program embodies the three basic elements of good nutrition: balance, moderation, and variety. These three elements are critical to staying healthy

EXHIBIT 6

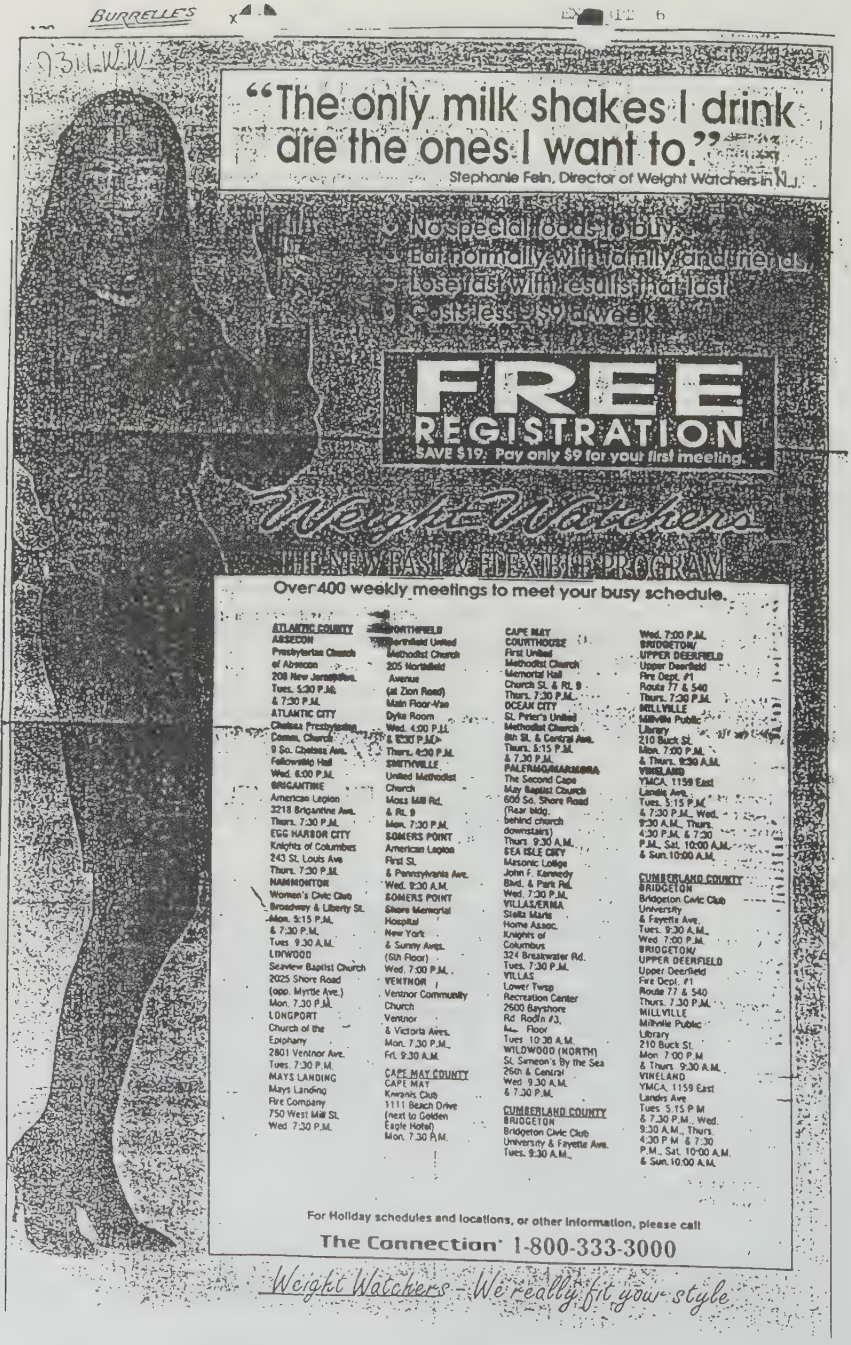

BURRELLE'S
"The only milk shakes I drink are the ones I want to."
Stephanie Fein, Director of Weight Watchers in N.J.
No special foods to buy.
But normally with family and friends.
Lose fast, with results that last.
Costs less than $9 a week.
FREE
REGISTRATION
SAVE $19. Pay only $9 for your first meeting.
Weight Watchers
THE NEW FAST & FLEXIBLE PROGRAM
Over 400 weekly meetings to meet your busy schedule.
ATLANTIC COUNTY
ABSECON
Presbyterian Church of Absecon
208 New Jerusalem
Tues. 5:30 P.M. & 7:30 P.M.
ATLANTIC CITY
Chelsea Presbyterian Comm. Church
9 So. Chelsea Ave.
Fellowship Hall
Wed. 6:00 P.M.
BRIGANTINE
American Legion
3218 Brigantine Ave.
Thurs. 7:30 P.M.
EGG HARBOR CITY
Knights of Columbus
243 St. Louis Ave
Thurs. 7:30 P.M.
HAMMONTON
Women's Civic Club
Broadway & Liberty St.
Mon. 5:15 P.M. & 7:30 P.M.
Tues 9:30 A.M.
LINWOOD
Seaview Baptist Church
2025 Shore Road (opp. Myrtle Ave.)
Mon. 7:30 P.M.
LONGPORT
Church of the Epiphany
2801 Ventnor Ave.
Tues. 7:30 P.M.
MAYS LANDING
Mays Landing Fire Company
750 West Mill St.
Wed 7:30 P.M.
NORTHFIELD
Northfield United Methodist Church
205 Northfield Avenue
(at Zion Road)
Main Floor-Wes Dyke Room
Wed. 4:00 P.M. & 6:30 P.M.
Thurs. 4:30 P.M.
SMITHVILLE
United Methodist Church
Moss Mill Rd. & Rt. 9
Mon. 7:30 P.M.
SOMERS POINT
American Legion
First St.
& Pennsylvania Ave.
Wed. 9:30 A.M.
SOMERS POINT
Shore Memorial Hospital
New York & Sunny Aves.
(5th Floor)
Wed. 7:00 P.M.
VENTHOR
Ventnor Community Church
Ventnor & Victoria Aves.
Mon. 7:30 P.M.
Fri. 9:30 A.M.
CAPE MAY COUNTY
CAPE MAY
Kiwanis Club
1111 Beach Drive (next to Golden Eagle Hotel)
Mon. 7:30 P.M.
CAPE MAY COURTHOUSE
First United Methodist Church
Memorial Hall
Church St. & Rt. 9
Thurs. 7:30 P.M.
OCEAN CITY
St. Peter's United Methodist Church
8th St. & Central Ave.
Thurs. 5:15 P.M. & 7:30 P.M.
PALERMO/MARMORA
The Second Cape May Baptist Church
600 So. Shore Road (Rear bldg. behind church downstairs)
Thurs. 9:30 A.M.
SEA ISLE CITY
Masonic Lodge
John F. Kennedy Blvd. & Park Rd.
Wed. 7:30 P.M.
VILLAS/ERMA
Stella Maris Home Assoc.
Knights of Columbus
324 Breakwater Rd.
Tues. 7:30 P.M.
VILLAS
Lower Twsp. Recreation Center
2600 Bayshore Rd. Rodin #3, ... Floor
Tues 10:30 A.M.
WILDWOOD (NORTH)
St. Simeon's By the Sea
26th & Central
Wed. 9:30 A.M. & 7:30 P.M.
CUMBERLAND COUNTY
BRIDGETON
Bridgeton Civic Club
University & Fayette Ave.
Tues. 9:30 A.M.
Wed. 7:00 P.M.
BRIDGETON/ UPPER DEERFIELD
Upper Deerfield Fire Dept. #1
Route 77 & 540
Thurs. 7:30 P.M.
MILLVILLE
Millville Public Library
210 Buck St.
Mon. 7:00 P.M. & Thurs. 9:30 A.M.
VINELAND
YMCA, 1159 East Landis Ave.
Tues. 5:15 P.M. & 7:30 P.M., Wed. 9:30 A.M., Thurs. 4:30 P.M. & 7:30 P.M., Sat. 10:00 A.M. & Sun. 10:00 A.M.
CUMBERLAND COUNTY
BRIDGETON
Bridgeton Civic Club
University & Fayette Ave.
Tues. 9:30 A.M.
Wed 7:00 P.M.
BRIDGETON/ UPPER DEERFIELD
Upper Deerfield Fire Dept. #1
Route 77 & 540
Thurs. 7:30 P.M.
MILLVILLE
Millville Public Library
210 Buck St.
Mon 7:00 P.M. & Thurs. 9:30 A.M.
VINELAND
YMCA, 1159 East Landis Ave.
Tues. 5:15 P.M. & 7:30 P.M., Wed. 9:30 A.M., Thurs. 4:30 P.M. & 7:30 P.M., Sat. 10:00 A.M. & Sun. 10:00 A.M.
For Holiday schedules and locations, or other information, please call
The Connection 1-800-333-3000
Weight Watchers - We really fit your style.

EXHIBIT 7

EXHIBIT 7

COURIER-STANDARD
ENTERPRISE

FORT PLAIN, NY
WEEKLY 4,778

OCT 10 1990

226 BURRELLE'S OF

nn31

Weight Watchers®

Safe, sensible weight loss for 27 years.

**Introducing 2 for 1 Special**

**Join by October 27, Share the cost.**
**Pay only $14.50 each.**

Come alone or bring a friend. It's that simple. What's also simple is the food plan itself. Its our most liveable, effective way to lose weight ever. So hurry and join Weight Watchers. That way you'll learn how to lose weight and maintain it for a lifetime.

*Ask about our Slimming Savings Special! 3 Ways to Win: Slim down, Save money and Special Prizes!*

Join for Half Price
Save $14.50

FAST & FLEXIBLE PROGRAM™

CANAJOHARIE
United Methodist Church
East Main Street
Thursday 6:00 pm

AMSTERDAM
Horace J. Inman,
Sr. Citizens Ctr.
53 Guy Park Avenue
Thursday 6:30 pm

GLOVERSVILLE
American Legion Hall
200 N. Main Street
Wednesday 5:30 pm
Thursday 9:00 am

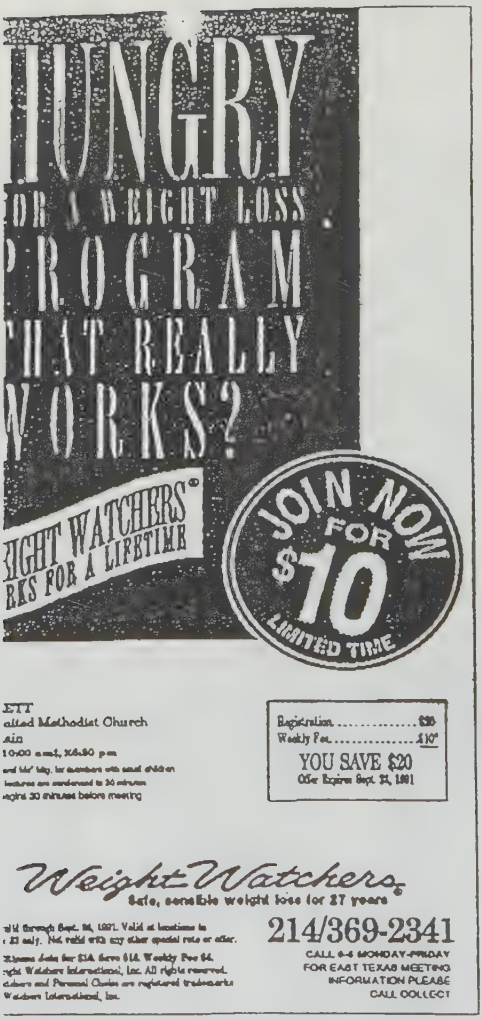
Ask about our prepayment savings and our AT WORK Program™
FOR MORE INFORMATION, CALL
**1-800-338-8838**

Offer good October 7th through October 27th, 1990. Fee for subsequent weeks $10. Offer valid at participating locations only. Cannot be combined with other discounts or special rates. Weight Watchers and Fast and Flexible are registered trademarks of WEIGHT WATCHERS INTERNATIONAL, INC. © 1990 WEIGHT WATCHERS INTERNATIONAL, INC.

WWI 13247

EXHIBIT 8

EXHIBIT 8




WW I 6455

EXHIBIT 9

KEYES MARTIN
Advertising Direct Marketing Sales Promotion

Copy

EXHIBIT 9

Date: 12/21/90 By

Client: Weight Watchers

Job #: WWS-235

Medium: Newspapers

Size: 235 - 4 X 10.5
235A - 3 X 10.5
235B - 6 X 18

Approval:

Pg. 1 of 2

Weight Watchers
January Kick-off ad

(Headline)
**Trusting a weight loss program**

(Copy)
Weight Watchers has been in business for 27 years. We don't rely on fads or gimmicks--just a safe, sensible approach to weight loss, based on sound nutrition, that works. And with our new 1991 Personal Choices Program, you decide the plan that's best for your lifestyle. You eat real food....and set your own pace. With the support you need to lose the weight and keep it off--all for just $10 a week.

(Caption)
Stephanie Fein
President, Weight Watchers in New Jersey, at goal weight for 13 years

(Offer copy)
FREE Registration
Pay only $10 for 1st meeting.
Save $19

(Logo)
Weight Watchers
Safe, sensible weight loss for 27 years.

WW I 54

# EXHIBIT 10

## *Our Unique Four-Way Approach To Weight Loss*

The new Quick Success program—it's not a diet, it's a *total* weight-loss package. Using our proven four-way approach, you'll progress toward one ultimate goal—permanent weight loss. Here's how it works. . . .

1. Our FOOD PLAN promotes safe weight loss through a variety of nutritious and satisfying foods. Plus
   - ☐ *It's easy to follow* — guiding you with simple Menu Planners.
   - ☐ *It fits your life-style* — providing you with a "spending allowance" of extra calories, plus plans for dining out, celebrating special occasions, and more!

2. Our EXERCISE PLAN helps you slim down, firm up, and feel good. It offers
   - ☐ *Five "figure-slimming" activities* — walking, walking-jogging, stationary bicycling, outdoor bicycling, and swimming, plus special firming and toning exercises.
   - ☐ *Four levels of participation* — including one that's just right for you!

3. Our SELF-DISCOVERY PLAN® helps you put your Food and Exercise Plans into action. It helps you
   - ☐ *Discover your food-related behavior patterns* through self-tests and quizzes.
   - ☐ *Learn new skills* to help you develop healthy eating and exercise habits.
   - ☐ *Look and feel your best* while you slim down.

4. Our unique GROUP SUPPORT system is the key that has helped millions of people lose weight. It brings you
   - ☐ *A sense of belonging*, cultivated by the caring and interaction from your weekly meeting.
   - ☐ *Team spirit*, sparked by the pursuit of a common goal.
   - ☐ *Inspiration and motivation* to get you through the week—and ultimately to your goal!

Food Plan + Exercise Plan + Self-Discovery Plan + Group Support = the Quick Success program, which can mean permanent weight loss!

EXHIBIT 10

The Weight Watchers program has been developed under the guidance and direction of a group of scientists and physicians who have helped make it the safest and most successful weight-loss program in the world.

*W. Henry Sebrell, M.D.*
Medical Consultant — Former Director of the National Institutes of Health and of the Institute of Human Nutrition at Columbia University

*William D. McArdle, Ph.D.*
Exercise Consultant — Professor of Physical Education and an Exercise Physiologist at Queens College of the City University of New York.

*Ronna Kabatznick, Ph.D.*
Psychological Consultant — Social Psychologist with a specialty in the behavioral aspects of weight management.

*Lelio G. Perducci, Ph.D.*
Vice President — International background in food research and development at the University of Strathclyde in Scotland, the University of Wisconsin, and with the H.J. Heinz Company.

*Nerma Frye, M.S., R.D./L.D.*
Nutritionist with expertise in Sports and Cardiovascular Nutrition, Preventive Medicine, and Worksite Health Promotion programs.

*Judy Marshel, M.B.A., R.D.*
Nutritionist with expertise in international nutrition and weight control.

*Mary Grace Sucholet, R.D.*
Nutritionist with expertise in communications and nutrition.

*Arlene Davis*
Exercise specialist with expertise in exercise for women and the overweight population.

*Reva T. Frankle, M.S.P.H., Ed.D., R.D.*
Nutrition Consultant — Formerly Director of Nutrition for Weight Watchers International.

*Barbara Ecker Gordon, M.S., R.D.*
Nutrition Consultant — Formerly Chief, Technical Services for Weight Watchers International.

Weight Watchers®
25 ANNIVERSARY

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Printed in U.S.A.

EXHIBIT 11

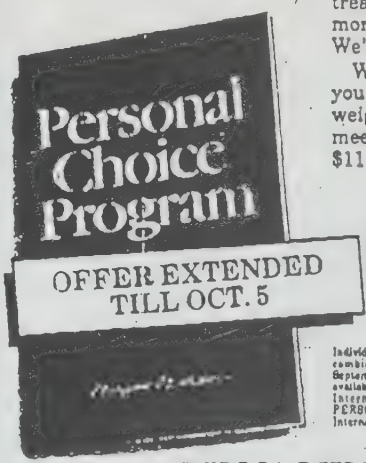
EXHIBIT 11

Newsday, Long Island, N.Y. 7/27/77

PART II S 58

# The Weight Loss Plan For People Who Like To Eat.

ASK ABOUT OUR
**FREE**
FAST START OPTION!




If you're having a hard time losing weight, chances are the problem isn't lack of willpower. It's what you're forced to eat.

That's why our Personal Choice® Program works so well. You get a wide variety of delicious real foods, including treats like pizza and chocolate cake. What's more, you can choose the foods you like. We'll show you how.

With a Program this flexible, we know you'll find the power within you to lose weight. And there's a Weight Watchers meeting near you to help. Join now for $11.00, a $17.00 savings.

CALL 595-1300 TODAY!

Weight Watchers

You've Got It In You To Get It Off You.

To bring Weight Watchers to your workplace call 516-595-1300

Individual weight loss may vary. Fee for subsequent weeks $10. Cannot be combined with any other offer. Offer valid September 1st through September 28th 1977. Offer valid in participating areas only. Offer not available for AT WORK or COMMUNITY MEETINGS © 1981 Weight Watchers International, Inc. All rights reserved. WEIGHT WATCHERS and PERSONAL CHOICE are registered trademarks of Weight Watchers International, Inc.

## JOIN NOW FOR JUST $11.00

## Call (516) 595-1300 For Information

## WEIGHT WATCHERS SCHEDULE OF MEETINGS

**BAY SHORE CENTER**
South Shore Mall (Breakaway between Macy's & Woolworth's)
Sun. - 11:30 a.m.
Mon. - 6 a.m., 10 a.m., 6 p.m., 7 p.m.
Tue. - 10 a.m., 12:00 p.m., 6 p.m., 7 p.m.
Wed. - 10 a.m. ♦WOW 12 Noon, 5 p.m., 7 p.m.
Thur. - 10 a.m. ♦YOUTH 6 p.m., 7 p.m.
Fri. - 10 a.m., 6 p.m., 7 p.m.
Sat. - 9 a.m., 11:30 a.m.

**BRIDGEHAMPTON**
Old Pitt House
Bridge Street & Main Street
Mon. - 10 p.m.
Tue. - 6:30 a.m.

**COMMACK CENTER**
Mayfair Shopping Center
Jericho Turnpike

**HAMPTON BAYS**
United Methodist Church
1664 W. Montauk Hwy. (Parish Hall)
Wed. - 6:00 p.m.

**HUNTINGTON CENTER**
Wall Whalman Mall
Rte. 110 Huntington Station
(Rear of Mandee New York Ave. side)
Mon. - 10 a.m., 6 p.m., 7 p.m.
Tue. - 10 a.m., 12 Noon, 5 p.m., 7 p.m.
Wed. - 10 a.m. ♦WOW 12:30 p.m., 5 p.m., 7 p.m.
Thur. - 10 a.m., 6 p.m., 7 p.m.
Fri. - 10 a.m., 6:15 p.m., ♦YOUTH 3:45 (returns Sept. 20th)
Sat. - 9 a.m.

**LAKE RONKONKOMA CENTER**
Park Plaza Shopping Center
Hawkins Ave.
Mon. - 10 a.m., 6 p.m.
Tue. - 10 a.m., 7 p.m.

**RIVERHEAD**
Temple Israel
(480 Northville Turnpike)
Mon. - 9:30 a.m.
Wed. - 7 p.m.

**SAYVILLE CENTER**
Grand Union Shopping Center
Montauk Highway (Eastern end of Town)
Sun. - 1 p.m.
Mon. - 10 a.m., 7 p.m.
Tue. - 10 a.m., 7 p.m.
Wed. - 10 a.m., 6 p.m., 7 p.m.
Thur. - 10 a.m., 7 p.m.
Fri. - 6 p.m.
Sat. - 10 a.m.

**SHELTER ISLAND**
At the Shelter Island Library
Thur. - 8:00

**SMITHTOWN CENTER**

EXHIBIT 12

LAST WEEK

EXHIBIT 12


ONLY 7 PER WEEK*
PLUS $10 TO REGISTER DURING MARCH
SAVE $10.
*Slightly higher in Manhattan & Nassau
PAY AS YOU GO NO CONTRACTS
SUPPORTIVE STAFF NO HARD SELL
EASIEST DIET TO FOLLOW
FAVORITE FOODS EVEN PIZZA
NEW FLEXIBLE FAST PROGRAM
IT WORKS! I FEEL TERRIFIC! JOIN NOW!
Lost 91 lbs./maintained for 10 years.
Weight Watchers®
As people vary, so does individual weight loss.

EXHIBIT 13

EXHIBIT 13

Weight Watchers®

As people vary, so does individual weight loss.

JOIN BY JUNE 30

There are over 1100 weekly meetings in the METRO AREA. For information call 1-800-333-3000

CITY HALL CENTER
15 Park Row 7th Floor
(Opposite City Hall)

EAST SIDE CENTER
210 E. 86th Street
(Bet. 2nd & 3rd Avenue)

45th STREET CENTER
17 E. 45th Street &
Madison Avenue

LEXINGTON AVE. CENTER
717 Lexington Avenue &
58th Street

• NEW LOCATION •
6TH AVENUE CENTER
Rockefeller Center Area
1290 Avenue of the Americas
(Between 51 & 52 Streets –
Lower Concourse)

34th STREET CENTER
19th W. 34th Street & 5th 7th Floor

24th STREET CENTER
220 E. 24th Street (Between 2nd & 3rd Avenue)

WEST SIDE CENTER
1780 Broadway–3rd Floor
(Between 57th & 58th Streets)

NYC
5 BOROS
(718) 229-1090

WESTCHESTER
COUNTY
(914) 423-1200

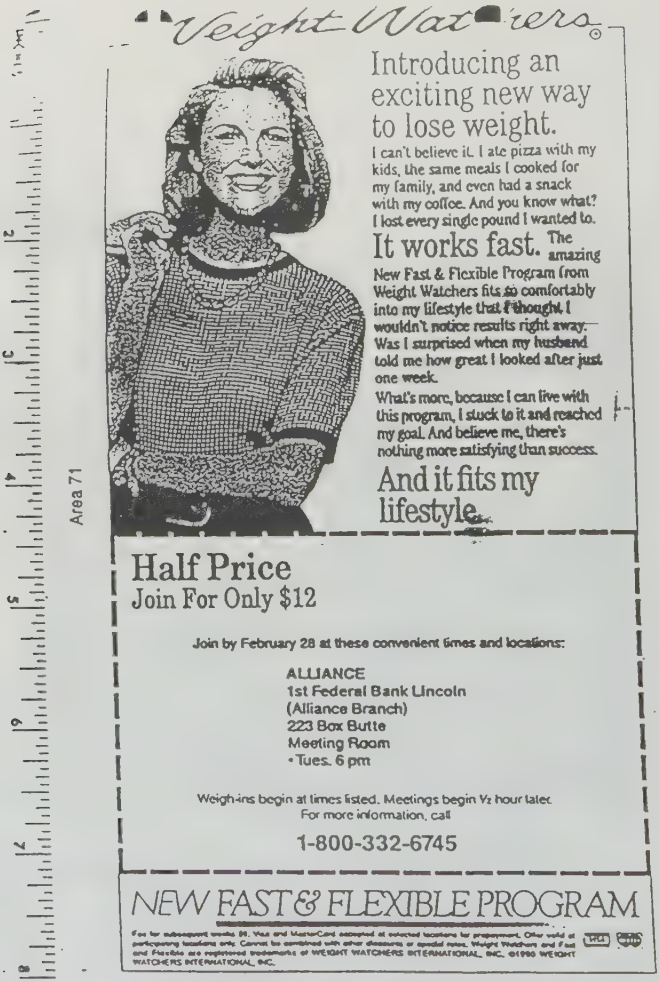
NASSAU
(516) 829-4434

BERGEN &
HUDSON COUNTIES
(201) 712-0266

ROCKLAND
COUNTY
(914) 634-7809

For a Weight Watchers meeting where you work call 1-800-8 AT WORK

EXHIBIT 14


Weight Watchers
Introducing an exciting new way to lose weight.
I can't believe it. I ate pizza with my kids, the same meals I cooked for my family, and even had a snack with my coffee. And you know what? I lost every single pound I wanted to.
It works fast. The amazing New Fast & Flexible Program from Weight Watchers fits so comfortably into my lifestyle that I thought I wouldn't notice results right away. Was I surprised when my husband told me how great I looked after just one week.
What's more, because I can live with this program, I stuck to it and reached my goal. And believe me, there's nothing more satisfying than success.
And it fits my lifestyle.
LAST WEEK!
Half Price
Join For Only $12
Join by February 28 at these convenient times and locations:
ALLIANCE
1st Federal Bank Lincoln
(Alliance Branch)
223 Box Butte
Meeting Room
• Tues. 6 pm
Weigh-ins begin at times listed. Meetings begin ½ hour later.
For more information, call
1-800-332-6745
NEW FAST & FLEXIBLE PROGRAM
Area 71
8.0"

HT WATCHERS INTERNATIONAL FEBRUARY, 1990 WEIGHT WATCHERS NEWSPAPER AD C

ication: ALLIANCE TIMES HERALD 071-1415
114 EAST 4TH STREET
ALLIANCE, NE 69301
act: RICK Phone: 308-762-3060

itle: A) NO MIRACLE B) TESTIMONIAL C) I LOVE FAST
lob #: 257

AD SIZE: SAU 2 col X 8.00 = 16.00 inches

INSERTION DATES: WILL NOT BEGIN BEFORE FEBRUARY 1, 1990
See insertion order for actual dates.

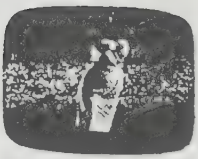
EXHIBIT 15

EXHIBIT 15

# WEIGHT WATCHERS INTERNATIONAL
"Hangers"
1989

LENGTH: 21 SECONDS

RESS OWNER (Not too appy): Tracy Burgess, before.



DRESS OWNER (Happy): Tracy Burgess, after.

VOICE OVER ANNCR: Now, at Weight Watchers, the difference...

(Cut to nightgown worn before.)

between "before" and "after"

Pan to nightie worn after.)

s fast.

VOICE OVER ANNCR: Our new Quick Success Program has a unique...

(Dissolve to dress worn before.)

food plan that...

(Pan to dress worn after.)

helps you lose weight...

Cut to before evening gown, before tuxedos.)

ast.

(Pan to after evening gown, after tuxedos.)

TUXEDO OWNERS (Happy): Whooo Whoooo

VOICE OVER ANNCR: Want proven results? Join Weight Watchers today

(Dissolve to sweats worn before.)

And start living .

(Pan to bike pants worn after.)

happily ever after

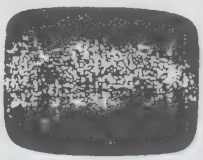
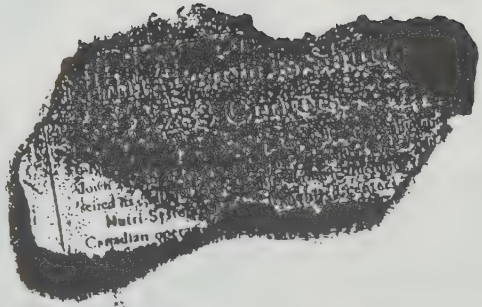


EXHIBIT 16



# ATTENTION NUTRI-SYSTEM® CLIENTS:

# THE NEWS IS NOT ALL BAD.

**Bring any proof of your Nutri-System membership to any Weight Watchers Personal Cuisine® Center and join completely free. All you'll pay for is the fabulous food.**

If you're one of those affected by the closing of many Nutri-System centers, don't worry.

Weight Watchers is ready to help you now.

Simply bring in any of your Nutri-System materials to any Weight Watchers Personal Cuisine Center.

Then, when you purchase your first week of delicious Personal Cuisine foods, there's no registration or weekly fee payable. That's a savings of $30*. It's that easy.

And the foods are so good, our members swear they're the best-tasting they've ever tried. And so quick to prepare, you don't have to lose time to lose weight.

At Weight Watchers, we've seen a lot of fad diets come and go in the thirty years we've been around.

That's why we don't believe in diets, but in a healthy combination of good nutrition, exercise and group support.

And that's how we've helped millions and millions of people lose weight. And learn how to keep it off, year after year after year.

It's not magic. But when you follow the program it works.

So if you've been with Nutri-System, we welcome you to try Weight Watchers Personal Cuisine. Our offer is valid until May 8, 1993.

We look forward to seeing you soon.

For further information on substituting Weight Watchers for Nutri-System or for details of your nearest Personal Cuisine Center (including our newest Center at the Hotel Beacon, 2130 Broadway, Suite 205), call:

**800-333-3000**

Weight Watchers

EXHIBIT 16

As people vary, so does individual weight loss and results.

*Subsequent purchases of Personal Cuisine foods require payment of a low weekly fee. Personal Cuisine foods available only at select Weight Watchers Centers. Offer ends May 8, 1993. Fee for subsequent weeks in Hackensack, Mamaroneck, Westchester, Rockland and Fairfield Counties $13.00; elsewhere $13.00. See receptionist for details. Offer available in NYC, Westchester, Rockland, Nassau, Hudson, Bergen and Fairfield Counties. VISA, MasterCard and Discover accepted. Cannot be combined with other discounts or special rates. Offer not available for AT WORK or COMMUNITY meetings. ©1993 WEIGHT WATCHERS INTERNATIONAL, INC., owner of the registered trademark. All rights reserved.

EXHIBIT 17

EXHIBIT 17

# HIP, HIP, GOODBYE.

If it's a smaller figure you're after, we've got one. With this terrific offer, it's a great time for you to join Weight Watchers and get one of your own.

You'll learn how to eat real foods right away. Handle real-life challenges. And develop permanent habits that won't just help you reach your goal weight. They'll help keep you there.

So take advantage of our great offer today. While your smaller figure may last forever, ours won't. So hurry and join Weight Watchers today.

## Personal Cuisine
## The Easiest Way to do Weight Watchers!

Now available in our Huntington/Melville and Stony Brook Locations.

**$5.00 OFF**
ONE PURCHASE OF PERSONAL CUISINE FOODS
Offer Valid With Coupon Only*
Expires April 30, 1983
* CANNOT BE COMBINED WITH ANY OTHER DISCOUNT.

Weight Watchers
PERSONAL CUISINE FOODS CAN MAKE IT EVEN EASIER.
Now we can offer as an option, the Personal Cuisine Food Plan, with delicious pre-packaged foods. Choose from 30 daily menus. This food option is available at our Huntington/Melville and Stony Brook Centers.
** YOU MUST BE A CURRENT MEMBER OF WEIGHT WATCHERS (ATTENDING MEETINGS AS STATED IN MEMBERSHIP POLICY) TO PURCHASE PERSONAL CUISINE FOODS.

**20%...OFF**
ANY ONE Weight Watchers Non-Food Product
Offer Valid With Coupon Only*
Expires April 30, 1983
*** LIMIT 1 DISCOUNT (FOR A NON-FOOD PRODUCT PURCHASE) PER COUPON

**FREE TRIAL MEETING**
Pay only if you join.
JOIN FOR ONLY $13
Offer Expires May 15

Weight Watchers

the new
Weight Watchers
595-1300
Schedule of Meetings

BAY SHORE CENTER
EAST NORTHPORT
HAMPTON BAYS
NEW BUNTINGTON/MELVILLE LECTURE CTR.
BRIDGEHAMPTON
MILLER PLACE CENTER
MONTAUK
SOUTHOLD
STONY BROOK CENTER
SCHEDULE OF MEETINGS

ANN LAND

DEAR ANN: N
experienced a p
were told that on
condition for wh
we should anticip
The pain we
though we are pu
find someone in
more, we must fa
sibility of losing
angel. Although
with us, we ar
grieving. There
cloud hanging
heads, it is diffi
through the da
breaking down
around with te
eyes.
Please, Ann, h
up a child? Alt
strong in faith,
hard to pray
May we ask yo
been in our shoes
our children out
Or us everyday li
about our other ch
for the loss? Can
them forever? Is t
what lies ahead?
help us?
— Arrow Throug

DEAR PARE
Every parent w
feel your pain
cruel blow
You give no
the nature of he
may have left I
if any of my re
will pass them
you. Over the
like family, and

DEAR ANN:
write this letter
ing a medical
suggested that
a very private
under any circ
matter with any
The other n
something that
knew about my
three people w
and my doctor.
I know Geo
when he's had
us that he refu
dence
This is not th
happened. If Ge
wrong, how ca
again? What sh

DEAR WIFE

EXHIBIT 18

WEIGHT WATCHERS EXHIBIT 18

LAST WEEK!

# GREAT SAVINGS ON FASTER WEIGHT LOSS.

**PROVEN-EFFECTIVE, TOO!**

Research proved it! Last year's Quick Success® Program melted pounds 20% faster than before. And this year's New 1989 Quick Success Program is even better, thanks to an easier-to-use food plan, an expanded and simplified optional exercise plan and that wonderful meeting experience made even more wonderful! Come prove to yourself what we already know – this is the program you can count on!

**HALF-PRICE**
**SAVE $10**
Don't miss out! Join today and save big!

Join by April 22 at these convenient times and locations:

BAKER
• NEW LOCATION
Senior Citizens Building
• Mon. 6 pm

BILLINGS
702 Central
• Mon. 6:30 am, 11:15 am, 6:45 pm & 8 pm
• Tues. 6:45 pm
• Wed. 9:30 am, 11:15 am & 5:30 pm (Childcare, Welcome 5:30 on)
• Thurs. 6:45 pm
• Fri. 8:30 am & 11:15 am
• Sat. 9:30 am

BILLINGS HTS.
Alliance Church
1100 Lake Elmo Rd.
• Tues. 6:30 pm
• Thurs. 6:45 pm

CLEARDYE
Congregational Church
100 Power St.
• Thurs. 6:30 am & 5:30 pm

HARDIN
Open Bible Church
• Mon. 5:30 pm

LAUREL
United Methodist Church
• Wed. 6:30 pm

LEWISTOWN
Methodist Church
• Thurs. 6:45 pm & 8:30 pm

MILES CITY
Mark's IGA
• Wed. 4:30 pm

SIDNEY
908 2nd Ave. SE
• Tues. 6 pm
• Thurs. 9 am

Weight Watchers may be able to come to your Community or AT WORK site. Call us for further information.

1-800-541-5630

THE NEW QUICK SUCCESS® PROGRAM

7.50"

\TCHERS INTERNATIONAL APRIL, 1989 NEWSPAPER AD CAMPAIGN

ion: BILLINGS GAZETTE 106-1320
401 N. BROADWAY
BILLINGS, MT 59103
BETTY WILLIAMS Phone: 406-657-1200

WWI 000000187

GREAT SAVINGS ON FASTER WEIGHT LOSS
242

AD SIZE: SAU 3 col X 7.50 = 22.50 inches

INSERTION DATES: WILL NOT BEGIN BEFORE MARCH 26, 1989

EXHIBIT 19

EXHIBIT 19

Before.

Before you know it.

Too many dieters never make it from "before" to "after."

Some lose motivation along the way. Others get too hungry from skimpy, so-called meals. And a few just give up—before the end of the first day.

If you're one of these people, then Weight Watchers New Quick Success Program can help you reach "after" a lot sooner than you think.

Last year alone, this proven effective program helped millions of members take off weight over 20% faster than ever. This year, it's even easier.

Our New Quick Success Program now includes even more delicious choices on its food plan. And as a Weight Watchers member, you'll receive the kind of support and motivation you need to change poor eating habits—and stick to your food plan.

If you'd like to make an even greater commitment to your weight loss effort, we offer an optional exercise plan. It's also the perfect way to build confidence and have some fun.

So if you've been thinking that "after" will never come, stop worrying. And start thinking about the great new figure—and fashions—you'll have soon after joining Weight Watchers.

For the Weight Watchers location nearest you, check your local telephone listing.

New for 1989
Quick Success™ Program

Weight Watchers®

EXHIBIT 20

EXHIBIT 20

WEIGHT WATCHERS

# THAT MILLION DOLLAR FIGURE IS NOW ON SALE!

THE PROVEN-EFFECTIVE WAY TO LOSE WEIGHT FASTER.

Research proved last year's Quick Success® Program melted pounds 20% faster than before. And now it's even easier to lose weight that fast! The New 1989 Quick Success Program has a revised food plan, plus an expanded and simplified optional exercise plan. And we've even improved that wonderful meeting experience. So what are you waiting for?

HALF-PRICE. SAVE $00

We've reduced the price of reducing, if you join now.

Join by (date) at these convenient times and locations:

Weight Watchers

THE NEW QUICK SUCCESS® PROGRAM

©

EXHIBIT 21

EXHIBIT 21

FREE
WEIGHT WATCHERS
OPEN HOUSE
MONTH 00-00!
Learn about our fastest-ever weight loss program!
Research proves our Quick Success® Program works 20% faster than before. And this year, it's new and even better, with a revised, easier-to-follow food plan and an expanded optional exercise plan. Even that wonderful meeting experience is better. Our friendly staff will be happy to answer your questions.
There's no obligation, of course!
PLACES:
TIMES:
For more information, call us at (000) 000-0000.
We're sure there's a Weight Watchers service that's right for you.
Weight Watchers

JANUARY FEBRUARY MARCH
APRIL MAY JUNE JULY AUGUST
SEPTEMBER OCTOBER NOVEMBER
DECEMBER 1 2 3 4 5 6 7
8 9 10 11 12 13 14 15 16
17 18 19 20 21 22 23 24
25 26 27 28 29 30 31

## STATEMENT OF COMMISSIONER DEBORAH K. OWEN CONCURRING IN PART AND DISSENTING IN PART

The Commission's decision to accept for public comment consent orders with three major marketers of low calorie diets, and to issue Part III complaints against two others, represents an important, and largely appropriate, next step in the Commission's efforts to address allegations of false and unsubstantiated advertising claims in the diet industry. However, I must dissent on two aspects of the proposed remedies in these matters.

First, in the earlier very low calorie diet cases, I took the position that the mandated weight loss maintenance disclosures were likely to be too complex to enlighten consumers if made during short radio or TV ads.[1] I recommended requiring more concise disclosures for such broadcast ads, which would be supplemented by full disclosure at the point of sale. The contemplated relief in the present five matters adopts much of this approach, and, as such, represents a significant improvement over the very low calorie diet consents. However, this improvement would not apply where a broadcast maintenance claim includes a number, percentage, or other descriptive term to convey a quantitative measure. I am concerned that this proviso will significantly reduce, if not eliminate, the incidence of shorter, more understandable broadcast ad disclosures, without providing sufficiently compensating gains in preventing deception. Furthermore, the proviso's language regarding descriptive terms conveying a quantitative measure is vague. Appropriate, non-deceptive claims may be inadvertently chilled as a result, and vexing compliance questions may arise as respondents attempt to conform to the requirements of the orders. Accordingly, I dissent with respect to inclusion of this proviso in the proposed consents and notice orders.

Second, I dissent with regard to the notice of possible action under Section 19(b) of the Federal Trade Commission Act, 15 U.S.C. 57b, in the Jenny Craig and Weight Watchers matters. Consumer redress has not been included in any of the recent settlements with marketers of very low, and low calorie diet programs, and there appear to be no distinguishable appropriate grounds for seeking this relief from Jenny Craig and Weight Watchers. Moreover, assessing consumer injury and determining levels of fair and equitable redress

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[1] *See* Statement Concurring in Part and Dissenting in Part in Jason Pharmaceuticals, Inc., File No. 902-3337, National Center for Nutrition, Inc., File No. 912-3024, and Sandoz Nutrition Corporation, File No. 912-3023 (Aug. 10, 1992).

are apt to pose insurmountable problems for meaningful Section 19(b) actions in these matters.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Weight Watchers International, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its principal place of business located at 175 Crossways Park West, Woodbury, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### DEFINITIONS

For the purposes of this order, the following definitions shall apply:

A. *"Competent and reliable scientific evidence"* shall mean those tests, analyses, research, studies, surveys, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

B. *"Weight loss program"* shall mean any program designed to aid consumers in weight loss or weight maintenance, when offered to consumers in classes or meetings of one or more individuals where person-to-person instruction in weight loss or weight maintenance is provided. Food products shall not be considered, for purposes of this order, part of a weight loss program unless they are advertised, promoted, offered for sale or sold as a necessary part, *e.g.*, "Personal Cuisine," of a "weight loss program." Cardio-Fitness Corporation programs shall not be deemed, for purposes of this order, "weight loss programs," unless they are advertised, promoted, offered for sale, or sold using the Weight Watchers trademark or name and otherwise satisfy the definition of "weight loss program."

C. *"Broadcast medium"* shall mean any radio or television broadcast, cablecast, home video, or theatrical release.

D. For any order-required disclosure in a print medium to be made *"clearly and prominently"* or in a *"clear and prominent manner,"* it must be given both in the same type style and in:

(1) Twelve point type where the representation that triggers the disclosure is given in twelve point or larger type; or

(2) The same type size as the representation that triggers the disclosure where that representation is given in a type size that is smaller than twelve point type.

E. For any order-required disclosure given orally in a broadcast medium to be made *"clearly and prominently"* or in a *"clear and prominent manner,"* the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure.

F. For any order-required disclosure given in the video portion of a television or video advertisement to be made *"clearly and prominently"* or in a *"clear and prominent manner,"* the disclosure must be of a size and shade, and must appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

I.

*It is ordered*, That Weight Watchers International, Inc., a corporation ("respondent"), its successors and assigns, and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation; provided, further, that for any representation that:

(1) Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants of respondent's program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to change of residence or medical reasons, such as pregnancy; or

(b) All participants who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondent's program, or earlier termination, as applicable; and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of participants

who were followed for a period of time after completing the program that is either:

(a) Generally recognized by experts in the field of treating obesity as being of sufficient length for predicting that weight loss will be permanent, or

(b) Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.D herein, that participants of any weight loss program have successfully maintained weight loss, unless respondent discloses, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary.";

Provided, further, that respondent shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondent's weight loss program;

Provided, however, that a truthful statement that merely describes the existence, design, or content of a weight maintenance or weight management program or notes that the program teaches participants about how to manage their weight will not, without more, be considered for purposes of this order a representation regarding weight loss maintenance success.

C. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.D herein, that participants of any weight loss program have successfully maintained weight loss, unless respondent discloses, clearly and prominently, and in close proximity to such representation, the following information:

(1) The average percentage of weight loss maintained by those participants;

(2) The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed; and

(3) If the participant population referred to is not representative of the general participant population for respondent's programs:

(a) The proportion of the total participant population in respondent's programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

(b) The statement: "Weight Watchers makes no claim that this [these] result[s] is [are] representative of all participants in the Weight Watchers program.";

provided, however, that for representations about weight loss maintenance success that do not use a number or percentage, or descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term," respondent may, in lieu of the disclosures required in C.(1)-(3) above,

(i) Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record."; and

(ii) For a period of time beginning with the date of the first dissemination or broadcast of any such advertisement and ending no sooner than thirty (30) days after the last dissemination or broadcast of such advertisement, give to each potential participant, by following the procedures set out in Appendix A, a printed document containing all the information required by paragraph I.B and subparagraphs I.C(1)-(3) of this order;

Provided, further, that compliance with the obligations of this paragraph I.C in no way relieves respondent of the requirement under paragraph I.A of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss;

Provided, however, that in determining the success of participants in maintaining weight loss, respondent may exclude those participants who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to change of residence or medical reasons, such as pregnancy;

D. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondent's weight loss program if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants of respondent's weight loss programs generally achieve, unless respondent discloses, clearly and prominently, and in close

proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

(1) What the generally expected success would be for Weight Watchers customers in losing weight or maintaining achieved weight loss; provided, however, that in determining the generally expected success for Weight Watchers customers, respondent may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to change of residence or medical reasons, such as pregnancy; and that for endorsements or testimonials about weight loss success, respondent can satisfy the requirements of this subparagraph by accurately disclosing:

(a) The generally expected success for Weight Watchers customers in the following phrase: "Weight loss averages (number) lbs. over __ weeks"; or

(b) (i) The average number of pounds lost by Weight Watchers customers, using the following phrase: "Average weight loss (number) lbs. More details at centers"; and

(ii) For a period of time beginning with the date of the first dissemination or broadcast of any such advertisement and ending no sooner than thirty (30) days after the last dissemination or broadcast of such advertisement, give to each potential participant, by following the procedures set out in Appendix B, a printed document containing what the generally expected success would be for Weight Watchers customers in losing weight, expressed in terms of both average number of pounds lost and average duration of participation in the Weight Watchers program, or,

(2) The limited applicability of the endorser's experience to what consumers may generally expect to achieve; *i.e.*, that consumers should not expect to experience similar results;

provided, however, that a truthful statement that merely describes the existence, design, or content of a weight maintenance or weight management program or notes that the program teaches participants how to manage their weight, or which states either through the endorser or in nearby copy that under the program "weight loss maintenance is possible," or words to that effect, will not, without more, be considered for purposes of this paragraph a representation regarding weight loss maintenance success or trigger the need for

separate or additional maintenance disclosures required by other paragraphs of the order;

Provided, further, that:

(i) A representation about maintenance by an endorser that states a number or percentage, or uses descriptive terms that convey a quantitative measure, such as "I have kept off most of my weight loss for 2 years," shall be considered a representation regarding weight loss maintenance success; and

(ii) If endorsements or testimonials covered by this paragraph are made in a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure.

E. Making comparisons between the efficacy or success of one or more of respondent's weight loss programs and the efficacy or success of any other weight loss program(s), including but not limited to any other of respondent's weight loss programs, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

F. Making any representation, directly or by implication, about the rate or speed at which any participant in any weight loss program has experienced or will experience weight loss, unless true.

G. Making any representation, directly or by implication, about the existence, contents, validity, results, conclusions, or interpretations of any test, study, or survey, unless true.

H. Making any representation, directly or by implication, about the performance or efficacy of any weight loss program, unless true.

II.

*It is further ordered*, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, or any other change in the corporation(s) that may affect compliance obligations arising out of this order.

III.

*It is further ordered*, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

IV.

*It is further ordered*, That respondent shall, within ten (10) days after the service of this order, distribute a copy of this order to each of its officers, agents, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, and to its regional managers; and distribute to those having point of sale responsibilities under the order, written instructions implementing the point of sale obligations of the orders; and, for a period of five (5) years from the date of service of this order, distribute same to all future such officers, agents, representatives, independent contractors, employees, and regional managers.

V.

*It is further ordered*, That:

A. Respondent shall use its best efforts to obtain its weight loss program franchisees' and licensees' compliance with this order by doing the following:

(1) Respondent shall, within forty-five (45) days after service of this order, distribute a copy of this order to each of its weight loss program franchisees or licensees, return receipt requested;

(2) Respondent shall review advertising and promotional materials submitted to it from its franchisees or licensees prior to

dissemination and publication to determine compliance with the requirements of this order;

(3) Respondent shall notify any franchisee or licensee in writing if any advertising or promotional material does not comply with the requirements of this order and that it should not be disseminated or published;

(4) Respondent shall monitor franchisee and licensee advertising and where it finds advertising that has not been submitted to it and which it believes is not in compliance with the requirements of this order, it will notify such franchisee or licensee in writing of its findings and that such advertising should be withdrawn;

(5) Respondent shall maintain separate files for each franchisee or licensee containing a copy of the signed receipt and copies of any correspondence relating to any advertising and promotional materials with respect to the issues raised by this order for a period of three (3) years;

(6) Upon request, respondent shall make these files available to the Commission staff for inspection and copying; and

(7) Where this order provides for the distribution of documents containing certain information to participants, respondent shall include such information in "Program" materials which its franchisees or licensees are required to supply to each participant.

B. Respondent shall include in all future weight loss program franchise or license agreements with new franchisees or licensees a requirement that the franchisee or licensee operate its business in full compliance with the prohibitions and affirmative requirements imposed on respondent pursuant to Part I of the Commission's order;

provided further, for purposes of this part of the order, the term "new franchisees or licensees" means those who are not franchised or licensed to conduct any weight loss program, or those who do not own or control such franchisees or licensees, at the time the order becomes final.

VI.

*It is further ordered*, That respondent shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

*It is further ordered*, That this order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years; and

B. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Azcuenaga dissenting, having no reason to believe the law has been violated. Chairman Pitofsky was recused, and Commissioner Thompson did not participate.[1]

[1] Prior to leaving the Commission, former Commissioner Starek registered his vote in the affirmative for issuing the decision and order in this matter.

**Re: Petition of Hoechst Marion Roussel, Inc., to Quash Subpoena Duces Tecum.**
**Hoechst AG, File No. 971-0055.**

October 17, 1997

Dear Mr. Spears:

This is to advise you of the ruling of the Federal Trade Commission ("Commission") on the Petition of Hoechst Marion Roussel, Inc. to Quash ("Petition") filed on May 1, 1997, in the above-referenced matter.[1] The Petition seeks to quash a subpoena duces tecum ("Subpoena") issued by the Commission on March 26, 1997.[2]

The ruling set forth herein has been made by Commissioner Roscoe B. Starek, III, pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4), 16 CFR 2.7(d)(4). Commissioner Starek has carefully reviewed the Petition, the accompanying exhibits, and the Declaration of Mr. Edward Stratemeier, General Counsel of HMRI ("the Stratemeier Declaration" or "the Declaration"). He has also considered the oral presentation on the Petition made on June 18, 1997, and the supplement to the Petition filed on June 24, 1997 ("Pet. Supp."). The Petition is granted in part and denied in part for the reasons stated below.

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[1] After granting several extensions of time to file a petition to quash, pursuant to Commission Rule of Practice 2.7(d) (3), 16 CFR 2.7(d) (3), the staff insisted that any such petition be filed by April 30, 1997. Petitioner filed a timely petition to quash on that date, and another version on May 1, 1997. The cover letter to the May 1 version stated that it corrected typographical and other errors found in the previous day's version and provided information about negotiations on April 30, 1997, with Commission staff to modify the Subpoena. The May 1 cover letter requested that the May 1 version be accepted for filing as a corrected copy. The Commission has determined to accept the May 1 version in substitution for the timely Petition filed on April 30, 1997.

[2] Although the Subpoena was addressed to Hoechst AG ("Hoechst") in care of Hoechst Marion Roussel, Inc. ("HMRI" or "Petitioner") -- a subsidiary of Hoechst with its North American headquarters in Kansas City, Missouri -- the Petition was filed only on behalf of HMRI. HMRI falls within the definition of "Hoechst" or "The Company" found in Definition A of the Subpoena. Because the Subpoena and the Petition are aimed primarily at documents in the possession of HMRI (including the files of HMRI's predecessor entities and of its agents and attorneys), the Commission has determined to consider the Petition insofar as it relates to those materials. The Commission declines, however, to accept the Petition's implicit assertion that only HMRI and not other Hoechst entities are subject to the Commission's Order and the Subpoena.

## I. BACKGROUND

Hoechst, HMRI, and various officers, employees, affiliates and other subsidiaries of Hoechst are bound by a Commission Decision and Order issued on December 5, 1995, in Hoechst AG, Docket No. C-3629 ("the order").[3] The order, which resolved the Commission's investigation of Hoechst's acquisition of Marion Merrell Dow, Inc., addressed concerns that the acquisition would lessen competition in four product markets, including, as relevant here, the market for the manufacture and sale of diltiazem hydrochloride used in the treatment of hypertension or angina. Among its other requirements, the order obligated Hoechst to grant Biovail Research Corporation ("Biovail") -- a research firm with which Hoechst had been developing diltiazem prior to the acquisition -- a right to refer to certain scientific data about diltiazem in FDA applications (order ¶ II.A.1) and prohibited Hoechst from instituting any patent infringement action against Biovail with respect to any "Biovail Diltiazem Products" (a term defined in order ¶ II.A.3).

On March 18, 1997, the Commission issued a Resolution Authorizing the Use of Compulsory Process in an investigation intended "[t]o determine whether respondent Hoechst AG is violating or has violated the order in Docket No. C-3629." On March 24, 1997, as part of this compliance investigation, the Commission issued the Subpoena challenged by HMRI's Petition.

## II. ANALYSIS

### *A. HMRI's claim that the Commission's resolution authorizing the Subpoena is fatally flawed because HMRI cannot have violated the order.*

HMRI argues -- most clearly in the supplement to its Petition -- that the resolution authorizing compulsory process in this matter is "fatally flawed" and that therefore the Subpoena must be quashed. The crux of HMRI's argument is that the resolution authorizes an investigation only of whether "HMRI" is violating or has violated the order and, moreover, does not authorize an investigation of contemplated or anticipated conduct.[4] HMRI contends further that

[3] The definition of the respondent "Hoechst" is set forth in paragraph I.A of the order.

[4] *See* Pet. Supp. at 1. HMRI repeatedly characterizes both the investigation and the Subpoena as directed only at HMRI. The resolution plainly states, however, that the investigation is directed at Hoechst AG and the "Hoechst" entities encompassed by order paragraph I.A.

the "objective facts of this case" make it facially obvious that HMRI could not have violated -- and is not now violating -- the order provisions with which the investigation is concerned (¶¶ II.A.1 & II.A.3). Therefore, HMRI suggests, the Subpoena is not supported by a valid resolution and must be quashed. *See* Pet. Supp. at 4-5.

To be valid, a compulsory process resolution need only (1) establish the agency's statutory authority to conduct the inquiry and (2) announce the purpose and scope of the investigation with sufficient specificity to allow a determination of whether the information sought is reasonably relevant to the stated purpose. *FTC v. Invention Submission Corp.,* 965 F.2d 1086, 1090 (D.C. Cir. 1992), *cert. denied,* 507 U.S. 910 (1993); *FTC v. Carter,* 636 F.2d 781, 788 (D.C. Cir. 1980); *FTC v. Texaco, Inc.,* 555 F.2d 862, 874 & n.26 (D.C. Cir.) (*en banc*), *cert. denied,* 431 U.S. 974 (1977); *see also RNR Enterprises, Inc. v. SEC,* 1997 U.S. App. Lexis 12174 (2d Cir. May 22, 1997). The resolution at issue here announces an investigation to determine whether the named respondent to a specific cease and desist order has violated or is violating that order. As HMRI concedes, it is clear beyond question that the Commission has authority to investigate compliance with its orders. Pet. Supp. at 4 n.1; *United States v. Morton Salt Co.,* 338 U.S. 632, 651 (1950).

Although it characterizes the resolution as flawed, HMRI does not actually challenge the resolution, HMRI concedes the Commission's authority to investigate compliance with its orders, does not challenge the legality of the resolution itself, and does not assert that the resolution fails to describe this inquiry adequately. Rather, HMRI argues that, as a factual matter, it cannot be violating or have violated the order -- as HMRI interprets the order -- and thus HMRI concludes that the "real" purpose of the investigation must be something other than its announced purpose. Pet. Supp. at 4 & n.1. As will be discussed in Part II.B, *infra*, the Subpoena (as modified by the instant ruling) seeks information reasonably relevant to the investigation of possible violations of the order properly announced by the resolution.

*B. HMRI's contention that the information sought by the Subpoena is irrelevant to an investigation of order violations because HMRI cannot have violated the order and because, both as a matter of law and under binding Commission regulations, documents reflecting interpretations of the order are irrelevant.*

HMRI correctly states that the resolution announces an investigation of possible order violations and argues that it cannot have violated order paragraph II.A.1 or II.A.3. Therefore, HMRI claims, the information sought by the Subpoena is by definition irrelevant because it is "impossible" for a violation to have occurred. Pet. Supp. at 4 & n.1. Although the resolution authorizes a potentially broader investigation than that depicted by HMRI, Petitioner is correct that Subpoena Specifications 1-4 and 6-11 focus on information relating to Hoechst's (and thus HMRI's) compliance obligations under order paragraph II.[5]

Contrary to Petitioner's argument, however, it is not "impossible" for Hoechst entities to have violated the order. Paragraph II.A.1 imposed an obligation on Hoechst to provide, within seven days after the order became final, a "right of reference" to Biovail that allows Biovail to use certain Hoechst scientific data to obtain FDA approval to manufacture and market certain drugs. HMRI interprets this provision extremely narrowly, asserts that it has complied with its own interpretation, and argues that any obligation to provide a broader right of reference can be triggered only by a future request from Biovail. *See* Pet. Supp. at 5-6. It is not necessary to resolve dispositively the merits of HMRI's reading of paragraph II.A.1 to see that HMRI's narrow interpretation appears to neglect the order's unconditional requirement that the right of reference be provided within seven days after the order became final.[6] Whether Hoechst's (and HMRI's) conduct to date has violated order paragraph II.A.1 is a factual question whose resolution should be advanced by the information sought by the Subpoena.

HMRI also argues that the Subpoena seeks internal documents reflecting subjective interpretations of the order and that, as a matter of law, those documents are irrelevant to the construction of the order. In HMRI's view, judicial precedent on the construction of consent orders establishes that documents reflecting a party's

[5] It is unnecessary to consider Specification 5 of the Subpoena, which seeks documents discussing plans that Hoechst is considering, has considered, or has determined to implement (or not to implement) if Biovail files a new drug application or an abbreviated new drug application ("ANDA") with the FDA for approval of a formulation of once-a-day diltiazem other than Tiazac. An important purpose of Specification 5 was to discover documents relating to Hoechst's intention to file suit against Biovail, given that such a suit could delay FDA action on an ANDA for up to 30 months. *See* 21 U.S.C. 355 (j) (4) (B) (iii). Since the Subpoena was served on Hoechst, Biovail has filed an ANDA with the FDA for such a drug, but Hoechst has not filed suit against Biovail within the period prescribed by statute. Accordingly, there is not evident need for the information sought by Specification 5.

[6] Although Hoechst/HMRI submitted a right of reference in December 1995, it appears that HMRI placed limitations on that right of reference in July 1996 and that counsel for HMRI sought confirmation of those restrictions in a letter to the FDA dated October 28, 1996.

subjective interpretations are irrelevant to the construction of an administrative consent order.

HMRI's argument on this point, however, focuses entirely on what, if anything, a court might properly rely on as extrinsic evidence in interpreting the order. HMRI's position ignores the range of other information -- whether or not ultimately admissible in court -- that is relevant to the Commission's pending pre-complaint investigation. The Commission has broad authority to gather relevant information to determine whether a respondent has violated an order issued by the Commission and whether enforcement action would be in the public interest. In *United States v. Morton Salt Co.,* 338 U.S. 632, 642-43 (1950), the Supreme Court distinguished between the limited scope of judicial subpoenas and the Commission's power to gather information:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency changed with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.

A Commission investigatory subpoena will be enforced if the documents are "not plainly irrelevant" to the investigative purpose. *FTC v. Carter, supra,* 636 F.2d at 788, citing *SEC v. Arthur Young & Co.,* 584 F.2d 1018, 1029 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1071 (1979). It is the respondent's burden to show that the requested information is irrelevant. *FTC v. Invention Submission Corp., supra,* 965 F.2d at 1090. In the current, pre-complaint stage of a nonpublic investigation, there is no requirement that the documents sought be admissible in a hypothetical judicial proceeding to prove some potential charge or complaint; all that is required is that the information sought be relevant to a determination of whether the law has been violated and whether the Commission should exercise its prosecutorial discretion to proceed. *FTC v. Texaco, Inc., supra,* 555 F.2d at 874 & nn.24-25. *See also Moore Business Forms, Inc. v. FTC,* 307 F.2d 188 (D.C. Cir. 1962) (court enforced subpoena over contention that documents were "meaningless" to any theory of

violation, where the agency had not yet formulated a ruling on the factual question raised by the company).

Alternatively, HMRI argues that the Commission may not subpoena internal company documents discussing the meaning or interpretation of the order because Commission Rule 2.32, 16 CFR 2.32, requires that all consent agreements contain language stating that

> no agreement, understanding, representation, or interpretation not contained in the order or the aforementioned [consent] agreement may be used to vary or to contradict the terms of the order.

But by its terms, Rule 2.32 is not a limitation on investigative activities but is merely guidance to the staff on certain waivers, procedures, and other "boilerplate" language that should appear in Commission orders. Obviously, the Commission must seek to define what materials it asserts are relevant in ascertaining the meaning of its orders. As relevant here, Rule 2.32 prohibits "sidebar" agreements and routine reference to extrinsic materials and declares the Commission's general policy with respect to the use of extrinsic materials. HMRI's Rule 2.32 argument -- like its argument about documents reflecting subjective order interpretations -- confuses relevance in an investigation with ultimate probative value in litigation. Nothing in Rule 2.32 bars the Commission from seeking records that may demonstrate an intent to violate the order, constitute admissions, or otherwise bear on the penalty or other remedy that should be sought.

Moreover, the agency's remedy for most order violations is to file a civil penalty action in federal court. No matter what HMRI or the Commission may think about the clarity of the order, a court called upon to judge Hoechst's order compliance -- particularly a court not convinced that the order is unambiguous -- may determine to consider extrinsic evidence to interpret the order.[7] Reviewing courts have considered a broad range of evidence to determine the correct interpretation of ambiguous consent orders. *See United States v. ITT Continental Baking Co.,* 420 U.S. 223 (1975) (compliant and negotiating history); *Dr. Pepper/Seven-Up Companies, Inc. v. FTC,* 151 F.R.D. 483 (D.D.C. 1993) (Commission's complaint, negotiating history, and internal legal memoranda); *United States v. American Society of Composers, Authors and Publishers,* 782 F. Supp. 778

[7] The staff and HMRI apparently agree that the order is clear on its face but disagree as to what obligations are imposed by the allegedly unambiguous language.

(S.D.N.Y. 1991) (negotiating history, internal legal memoranda, and post-decree conduct of parties to decree). In employing its broad investigative authority in aid of its exercise of prosecutorial discretion, the Commission is entitled to subpoena information that might ultimately be cited or relied on in a federal court proceeding to redress order violations.

HMRI's arguments and admissions themselves demonstrate the relevance of the information sought by the Subpoena. Order paragraphs II.A.1 and II.A.3 use the term "Biovail Diltiazem Products," which paragraph I.J defines to include once-a-day diltiazem formulations that Hoechst was developing with Biovail. HMRI contends that Tiazac is the only "Biovail Diltiazem Product," and that accordingly Hoechst has already performed all obligations imposed by paragraph II.A.1 respecting the grant of a right of reference to Biovail.[8] Pet. Supp. at 5. HMRI nonetheless concedes that some inquiry into the HMRI/Biovail relationship is relevant to a determination of which products were developed under the Hoechst/Biovail relationship. *Id.* at 10-11. Plainly HMRI and the staff disagree over the meaning of the term "Biovail Diltiazem Products" and the potential scope of Hoechst's obligations under the order. As limited by this ruling -- and as explained in Part II.C, *infra* -- the Subpoena seeks information relevant to clarification of those issues.

### *C. HMRI's argument that the Subpoena is unlimited in scope and imposes an undue burden.*

HMRI takes the position that the Subpoena requires a search of literally hundreds of entities, including its affiliates and subsidiaries, its law firms, and a variety of entities in which it has an ownership interest. The Petition also argues that the Subpoena covers an unnecessarily broad time period, extending beyond the period of its relationship with Biovail. In support of these contentions, HMRI filed the Declaration of Mr. Stratemeier. That Declaration detailed the scope of the search required to comply with the Subpoena. Mr. Stratemeier also represented under oath that HMRI had collected the files of its predecessor or acquired entities (Marion Merrell Dow and

[8] Paragraph I.J of the order defines "Biovail Diltiazem Products" as:
the sustained release and/or extended release diltiazem products that Hoechst was developing with Biovail pursuant to the Rights Agreement that Hoechst and Biovail entered into on June 30, 1993.

This definition appears by its terms to encompass multiple products, raising a threshold obstacle to HMRI's argument that Tiazac was the sole "Biovail Diltiazem Product."

Hoechst Roussel Pharmaceuticals, Inc.), as well as the files of specific responsible individuals identified by name,[9] and that those files were being maintained in the possession of HMRI when Mr. Stratemeier executed his Declaration.

When the Commission's need for relevant documents to complete its law enforcement investigation is balanced against the burden that would be imposed on HMRI and other Hoechst entities, it appears that the Declaration -- in combination with factual developments that occurred after all papers were filed in this matter[10] -- provides a basis for some narrowing of the Subpoena. In addition, it appears that a search for some records may be unnecessary and, accordingly, may at a minimum be deferred until the staff has reviewed the initial wave of production and determined whether a further search is required.

Essentially, the Declaration suggests that all relevant responsive documents are in HMRI's possession. At the oral presentation before Commissioner Starek, however, Mr. Spears of Gadsby & Hannah (representing HMRI) agreed that responsive factual documents were also likely to be in the possession of either his law firm or Skadden Arps Slate Meagher & Flom ("Skadden Arps"), HMRI's counsel in their merger investigation that culminated in the Commission's issuance of the order.[11] Moreover, the staff may ultimately need documents created or prepared by Skadden Arps lawyers or employees (subject to specific privilege claims) to complete its inquiry.

Nevertheless, it appears acceptable to defer any search for Skadden Arps internal materials -- as distinguished from Hoechst-generated documents in that law firm's possession -- until the staff has reviewed material received from Hoechst and HMRI material and determined whether information from other sources would advance the investigation.[12] Accordingly, the required search is divided into two successive phases and limited as follows:

PHASE I: Production in this phase may be limited to (a) all responsive documents or portions of documents in the possession or custody of HMRI; (b) all responsive documents or portions of documents in all files of all individuals identified in the Stratemeier Declaration, wherever those individuals' files are located within

[9] Stratemeier Dec. ¶¶ 5, 9-10.

[10] *See* note 5, *supra.*

[11] Transcript of Oral Presentation at 49 (June 18, 1997).

[12] In addition, Specification 8 is limited to require only the production of documents that discuss joint development of once-a-day diltiazem formulations by Biovail and Hoechst entities or their predecessors. Petitioner need not produce documents that discuss only Biovail's unilateral development activities or activities involving third parties.

Hoechst (as "Hoechst" is defined in the Subpoena); (c) all responsive documents or portions of documents in all files of Marion Merrell Dow and Hoechst Roussel Pharmaceuticals, Inc., identified in the Stratemeier Declaration; (d) all responsive Hoechst-generated documents or portions of Hoechst-generated documents in the possession, custody, or control of Gadsby & Hannah or Skadden Arps.
PHASE II: If the staff determines it to be necessary, the production will also include all responsive documents or portions of documents in the possession, custody, or control of Skadden Arps, except for responsive documents produced during Phase I or listed in a privilege log during Phase I.[13]

Moreover, as noted above,[14] events that occurred after the filing of the Petition have obviated any immediate search for information on HMRI's intention (if any) to file a patent infringement action against Biovail. Accordingly, Specification 5 is eliminated.[15]

HMRI suggests further that, in the event the Commission does not quash the Subpoena, the time period which Biovail and Hoechst Roussel Pharmaceuticals, Inc., had a development relationship (*i.e.,* June 30, 1993, to August 25, 1995). Pet. Supp. at 11 n.10. HMRI argues that documents dated or generated before the beginning or after the end of that period are irrelevant.

On the contrary, the period between January 1, 1993, and June 30, 1993 is relevant to this investigation. HMRI concedes that the relationship between Biovail and Hoechst Roussel Pharmaceuticals, Inc., is a legitimate area of inquiry, Pet. Supp. at 10-11, and responsive documents generated or prepared during the six months during which that relationship was formulated are relevant. Documents generated or prepared during the period immediately following the termination of the relationship are also relevant. In addition, Specifications 1 and 3 seek, *inter alia,* documents relating to HMRI's attempt to limit the right of reference in letters sent to the FDA in July and October 1996. Whether this limitation violated the order is obviously relevant to this investigation. As to these two Specifications, therefore, the first 11 months of 1996 are also relevant.

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[13] HMRI may file a further petition to quash within 10 days after service on it of any written request by the staff to conduct the Phase II search.

[14] *See* note 5, *supra.*

[15] Although Petitioner need not produce information called for by Specification 5 regarding litigation plans, other specifications of the Subpoena seek information about Hoechst's compliance obligations under order paragraph II.A.3, which prohibits the filing of patent infringement suits against Biovail relating to the "Biovail Diltiazem Products." Because, as HMRI concedes, there is a legitimate basis for seeking information about the meaning and scope of "Biovail Diltiazem Products" (defined in paragraph I.J), documents discussing compliance obligations under paragraph II.A.3 are relevant even if specific violations of that paragraph may not have occurred. Compliance with those other Subpoena specifications is therefore required (as modified and limited by the instant ruling).

Accordingly, Instruction 2 of the Subpoena is modified by (1) deleting from the first sentence the phrase "on or after January 1, 1993" and substituting therefor the phrase "during the period January 1, 1993, through December 31, 1995"; (2) deleting the second sentence; and (3) adding the following as a new second sentence: "As they relate to Hoechst's actual or potential obligations under paragraph II.A.1 of the order, however, Specifications 1 and 3 cover documents dated, generated, received, or, if a contract or agreement, in effect during the period January 1, 1993, through November 30, 1996."

*D. HMRI's claim that the Subpoena is directed at its counsel's files and improperly fails to provide adequate safeguards for proper assertion of the attorney-client and attorney work product privileges.*

Finally, Hoechst contends that the Subpoena must be quashed because it seeks documents from the files of Hoechst's in-house and outside counsel that may contain information protected by the attorney-client and attorney work product privileges. Essentially, HMRI argues that the Subpoena is directed primarily at attorneys' files and thus should be quashed absent a demonstration of need.

This argument is obviated by the modifications set forth in Part II.C, *supra*. The initial phase of the search does not require any search of outside law firms' files for anything except documents generated by employees of Hoechst or of HMRI.[16] Specification 5 (seeking information on litigation plans) is withdrawn, and (with some exceptions) no document generated after the last day of 1995 is sought. No further search of Gadsby & Hannah's files is required. A Phase II search of Skadden Arps's files will be required only if further information is needed after Phase I production is reviewed.

HMRI also argues that it need not produce a privilege log. HMRI bases this claim both on the Subpoena's allegedly sweeping nature and on the proposition that Subpoena Instruction 7 requires so much information that filing a log fully compliant with that instruction would divulge privileged information. But because HMRI's objection to the Subpoena's reach (Pet. Supp. at 14-15) was based on the scope of Definition A -- which defined the "Hoechst" entities to be searched

[16] This discussion necessarily uses short-form descriptions of the specific modifications of the Subpoena set forth in Part II.C, *supra*. These short-form references do not vary or modify the specific modifications set forth in Part II.C.

-- and on Specification 5 -- which sought current litigation plans -- HMRI's first argument is obviated by the Subpoena modifications discussed above. The scope of the search has been limited, Specification 5 has been withdrawn, and no recently created documents are sought.

With regard to HMRI's second ground for objecting to production of a privilege log, the Commission's Rules of Practice, in accord with judicial precedent, require a party seeking to withhold documents or other evidence on the basis of privilege to provide sufficient underlying facts to establish its privilege claim. *See* 16 CFR 2.8A. The burden is on Hoechst "to present the underlying facts demonstrating the existence of privilege." *FTC v. Shaffner,* 626 F.2d 32, 37 (7th Cir. 1980); *accord, United States v. Construction Products Research, Inc.,* 73 F.3d 464, 473 (2d Cir.), *cert. denied,* 117 S. Ct. 294 (1996). Hoechst's blanket assertion of attorney-client and work product privileges is insufficient to satisfy its burden. *FTC v. Shaffner,* 626 F.2d at 37.

Hoechst also claims that the Commission has failed to make an allegedly required showing of need to compel the production of privileged documents.[17] This argument is unavailing: the Subpoena does not require the production of privileged documents. Rather, the Subpoena requires Hoechst to produce all responsive non-privileged documents, non-privileged portions of documents that contain some allegedly privileged information, and a privilege log. The purposes of the privilege log are to identify the responsive documents (or portions of documents) that Hoechst claims are privileged and to provide sufficient information about those privilege claims to equip the Commission to assess and, if necessary, challenge the validity of questionable claims.

Instruction 7 of the Subpoena is entirely consistent with Federal Rules of Civil Procedure 26(b) (5) and 45 (d) (2). Instruction 7 explicitly states that although the description of a withheld document must be sufficient to allow the Commission to assess the validity of the privilege, HMRI need not disclose any privileged information or communication. As Federal Rules 26(b) (5) and 45 (d) (2) emphasize, a proper assertion of privilege must describe the nature of the allegedly privileged document or communication and provide

[17] HMRI appears to suggest that the Commission must make a heightened showing of need, rather than of relevance, before it can subpoena documents that happen to be in the files of someone licensed to practice law. This is incorrect. *FTC v. Shaffner, supra,* 626 F.2d at 36-37. HMRI cannot argue that a heightened showing is necessary as to privileged documents because, by refusing to submit a log, it has failed to establish the privileged nature of the withheld documents.

sufficient information to allow the party seeking the information to contest the claim. *United States v. Construction Products Research, Inc., supra,* 73 F.3d at 473-74 (party asserting attorney-client or work-product privilege must supply a specific explanation of why each document is privileged and affidavits or evidence establishing existence of privileged relationship, if existence of privileged relationship is not facially obvious). HMRI's failure to provide the required information at the times specified below for compliance will waive its privilege claims. *See Dorf & Stanton Communications v. Molson Breweries,* 100 F.3d 919, 922-23 (Fed. Cir.), *cert. denied,* 117 S. Ct. 2455 (1997).

## III. CONCLUSION

For the foregoing reasons, the Petition is granted in part and denied in part, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), Hoechst is directed to comply with Phase I production pursuant to the Subpoena, as modified, on or before October 31, 1997, and to produce by that date any privilege log that it chooses to submit in compliance with Instruction 7 of the Subpoena. Phase II production (if any is required), including submission of any privilege log, will occur 30 days after receipt by HMRI of a written instruction from the Assistant Director for Compliance, Bureau of Competition, to produce Phase II documents.

Pursuant to Rule 2.7(f), 16 CFR 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. The filing of such a request shall not stay the return date in this ruling unless the Commission otherwise specifies.

**Re: Request of Hoechst Marion Roussel, Inc., for Full Commission Review of Ruling on Petition to Quash Subpoena. Hoechst AG, File No. 971-0055.**

November 19, 1997

Dear Mr. Spears:

The Commission has considered (1) the Petition filed on behalf of Hoechst Marion Roussel, Inc. ("HMRI"), and other Hoechst entities to quash the pending subpoena duces tecum in the above-referenced matter ("the Subpoena"); (2) the transcript of the oral presentation on the Petition made on June 18, 1997; (3) the supplement to the Petition filed on June 24, 1997; (4) the October 17, 1997, ruling by Compulsory Process Commissioner Starek, granting the Petition in part and denying it in part ("the October 17 ruling"); (5) the specifications of the Subpoena, as modified by the October 17 ruling; and (6) your client's request for full Commission review of that ruling.

You ask that the Commission hear oral argument on review of the October 17 ruling. The Commission denies that request. There is no legal requirement that the Commission hear oral argument on petitions to quash subpoenas. *FTC v. Hallmark Cards, Inc.*, 265 F.2d 433 (7th Cir. 1959). Moreover, there was ample opportunity to make an oral presentation before Commissioner Starek, and the 59-page transcript of that presentation is before the Commission.

The Commission has determined that the request for review raises no issues that were not fully considered and discussed in the October 17 ruling. Upon review of all the material noted above, the Commission concurs in and adopts the October 17 ruling.

In determining to order enforcement of the Subpoena as modified, the Commission wishes to address a misunderstanding that has arisen in your request for full Commission review.[1] Your request states HMRI's understanding that it need not produce any privilege log until it has exhausted all judicial appeals on its contention that some subpoenaed documents are irrelevant to the investigation.[2] On the

[1] The Commission also notes that there is an error in Attachment C to your request, which is a CompareRite that you created to reflect the modifications to the Subpoena made by the October 17 ruling. The last sentence of Instruction 2 (both in its original version and as it appears in your CompareRite) was deleted by the October 17 ruling. Therefore, the Subpoena is no longer continuing in nature.

[2] Request at 18 n.21.

contrary, the October 17 ruling clearly required HMRI to produce the privilege log(s) called for by Instruction 7 of the Subpoena at the times specified for compliance with the Subpoena.[3] The Commission rejects the apparent suggestion that HMRI may contest enforcement on one legal ground (relevance) and then -- after the exhaustion of appeals from a federal court order rejecting HMRI's relevance arguments and ordering enforcement -- may recommence litigation on its privilege claims. The Commission is entitled to the logs on the date(s) ordered for compliance with the Subpoena, so that it can determine whether to challenge the privilege claims in any enforcement action that may be necessary. *See* Commission Rule 2.13. Therefore, the Commission will deem waived any assertion of privilege that is not made (and perfected with all supporting exhibits or affidavits) by the dates for compliance set forth below.

By letter dated October 31, 1997, Commissioner Starek granted your request to stay compliance obligations pending a ruling by the full Commission. Commission Rule 2.7(f). The Commission hereby directs that on or before December 3, 1997, Hoechst (1) comply with Phase I production pursuant to the Subpoena, as modified, and (2) produce any accompanying privilege log in compliance with Instruction 7 of the Subpoena. Phase II production (if any is required), including the submission of any privilege log, will occur 30 days after receipt by HMRI of a written instruction from the Assistant Director for Compliance, Bureau of Competition, to produce Phase II documents.

[3] October 17 ruling at 13.

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